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REPORTS OF CASES
ARGUED AND DETERMINED IN THE
APPELLATE COURTS
OF ILLINOIS

WITH A DIRECTORY OF THE JUDICIARY DEPARTMENT COR-
RECTED TO THE FIFTEENTH OF AUGUST, 1899, AND A
TABLE OF CASES REVIEWED BY THE SUPREME
COURT TO THE FIRST OF AUGUST, 1899

VOL. LXXXIII
A. D. 1899

REPORTED BY
MARTIN L. NEWELL
COUNSELOR AT LAW

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CORRECTED TO AUGUST 15, 1899.

(1) THE SUPREME COURT.

The Supreme Court consists of seven justices, elected for a term of nine years, one from each of the seven districts into which the State is divided.

Formerly the State was divided into three grand divisions, Southern, Central and Northern, in which the terms were held, with one clerk for each of the three grand divisions elected for a term of six years, the court sitting at Mt. Vernon, Springfield and Ottawa.

In 1897 these divisions were consolidated into one comprising the entire State, and provision made that all terms of the court be held in the city of Springfield, on the first Tuesday in October, December, February, April and June of each year.

REPORTER.

ISAAC N. PHILLIPS..... Bloomington.

JUSTICES.

<i>First District</i> —CARROLL C. BOGGS.....	Fairfield.
<i>Second District</i> —JESSE J. PHILLIPS.....	Hillsboro.
<i>Third District</i> —JACOB W. WILKIN.....	Danville.
<i>Fourth District</i> —JOSEPH N. CARTER.....	Quincy.
<i>Fifth District</i> —ALFRED M. CRAIG.....	Galesburg.
<i>Sixth District</i> —JAMES H. CARTWRIGHT.....	Oregon.
<i>Seventh District</i> —BENJAMIN D. MAGRUDER.....	Chicago.

The Chief Justice is chosen by the court, annually, at the June term. The rule of the court is to select as successor to the presiding justice the justice next in order of seniority who has not served as Chief Justice within six years last past. Mr. Justice Cartwright is the present Chief Justice.

CLERKS.

CHRISTOPHER MAMER, Northern Grand Division, 158 Throop St., Chicago.
ALBERT D. CADWALLADER, Central Grand Division, Lincoln.
JACOB O. CHANCE, Southern Grand Division, Mt. Vernon.

The terms of office of these clerks expire 1902, after which time, under the act of 1897, but one clerk will be elected. The present clerks continue in charge of the records of their respective grand divisions as though said grand divisions had not been consolidated. All records, files, dockets and papers of their respective offices are now kept at the State House in Springfield.

(2) APPELLATE COURTS.

These Courts are held by Judges of the Circuit Courts assigned by the Supreme Court for a term of three years. One Clerk is elected in each district.

REPORTER.

MARTIN L. NEWELL, Springfield.

FIRST DISTRICT.

Composed of the county of Cook.

Court sits at Chicago on the first Tuesdays of March and October.

CLERK—Thomas N. Jamieson, Ashland Block, Chicago.

NATHANIEL C. SEARS, Presiding Justice, Ashland Block, Chicago.
FRANCIS ADAMS, Justice, Ashland Block, Chicago.
THOMAS G. WINDES, Justice, Ashland Block, Chicago.

BRANCH APPELLATE COURT.*

FIRST DISTRICT.

OLIVER H. HORTON, Presiding Justice, Ashland Block, Chicago.

HENRY M. SHEPARD, Justice, Ashland Block, Chicago.

HENRY V. FREEMAN, Justice, Ashland Block, Chicago.

APPELLATE COURTS—(CONTINUED.)

SECOND DISTRICT.

Composed of the Northern Grand Division of the Supreme Court, except Cook county.

Court sits at Ottawa, La Salle county, on the first Tuesdays in April and October.

CLERK—Christopher C. Duffy, Ottawa.

JOHN D. CRABTREE, Presiding Justice, Dixon.
DORRANCE DIBELL, Justice, Joliet.
HARRY HIGBEE, Justice, Pittsfield.

THIRD DISTRICT.

Composed of the Central Grand Division of the Supreme Court.

Court sits at Springfield, Sangamon county, on the third Tuesdays in May and November.

CLERK—W. C. Hippard, Springfield.

FRANCIS M. WRIGHT, Presiding Justice, Urbana.
OLIVER A. HARKER, Justice, Carbondale.
BENJAMIN R. BURROUGHS, Justice, Edwardsville.

* This court is a branch of the Appellate Court of the first district, and is held by three judges of the Circuit Court, designated and assigned by the Supreme Court under the provisions of the act of the General Assembly, approved June 2, 1897. Hurd's Statute, 1897, 508, Laws of 1897. 185.

CIRCUIT COURTS.

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FOURTH DISTRICT.

Composed of the Southern Grand Division of the Supreme Court.
Court sits at Mount Vernon, Jefferson county, on the fourth Tuesdays in February and August.
CLERK—Frank W. Havill, Mount Vernon.

NICHOLAS E. WORTHINGTON, Presiding Justice, Peoria.
JAMES A. CREIGHTON, Justice, Springfield.
HIRAM BIGELOW, Justice, Galva.

(3) CIRCUIT COURTS.

Exclusive of Cook county, the State of Illinois is divided into Seventeen Judicial Circuits, as follows:

First Circuit.—The counties of Alexander, Pulaski, Massac, Pope, Johnson, Union, Jackson, Williamson and Saline.

JUDGES.

JOSEPH P. ROBARTS, Cairo.
OLIVER A. HARKER, Carbondale.
ALONZO K. VICKERS, Vienna.

Second Circuit.—The counties of Hardin, Gallatin, White, Hamilton, Franklin, Wabash, Edwards, Wayne, Jefferson, Richland, Lawrence and Crawford.

JUDGES.

EDMUND D. YOUNGBLOOD, Mount Vernon.
PRINCE A. PEARCE, Carmi.
ENOCH E. NEWLIN, Robinson.

Third Circuit.—The counties of Randolph, Monroe, St. Clair, Madison, Bond, Washington and Perry.

JUDGES.

BENJAMIN R. BURROUGHS, Edwardsville,
MARTIN W. SCHAEFER, Belleville.
WILLIAM HARTZELL, Chester.

Fourth Circuit.—The counties of Clinton, Marion, Clay, Fayette, Effingham, Jasper, Montgomery, Shelby and Christian.

JUDGES.

WILLIAM M. FARMER, Vandalia.
TRUMAN E. AMES, Shelbyville.
SAMUEL L. DWIGHT, Centralia.

Fifth Circuit.—The counties of Vermilion, Edgar, Clark, Cumberland and Coles.

JUDGES.

HENRY VAN SELLAR, Paris.
FERDINAND BOOKWALTER, Danville.
FRANK K. DUNN, Charleston.

Sixth Circuit.—The counties of Champaign, Douglas, Moultrie, Macoupin, DeWitt and Piatt.

JUDGES.

FRANCIS M. WRIGHT, Urbana.
EDWARD P. VAIL, Decatur.
WILLIAM G. COCHRAN, Sullivan.

CIRCUIT COURTS.

Seventh Circuit.—The counties of Sangamon, Macoupin, Morgan, Scott, Green and Jersey.

JUDGES.

JAMES A. CREIGHTON, Springfield.
ROBERT B. SHIRLEY, Carlinville.
OWEN P. THOMPSON, Jacksonville.

Eighth Circuit.—The counties of Adams, Schuyler, Mason, Cass, Brown, Pike, Calhoun and Menard.

JUDGES.

JOHN C. BROADY, Quincy.
HARRY HIGBEE, Pittsfield.
THOMAS N. MEHAN, Mason City.

Ninth Circuit.—The counties of Knox, Warren, Henderson, Hancock, McDonough and Fulton.

JUDGES.

JOHN J. GLENN, Monmouth.
GEORGE W. THOMPSON, Galesburg.
JOHN A. GRAY, Canton.

Tenth Circuit.—The counties of Peoria, Marshall, Putnam, Stark and Tazewell.

JUDGES.

LESLIE D. PUTERBAUGH, Peoria.
THOMAS M. SHAW, Lacon.
NICHOLAS E. WORTHINGTON, Peoria.

Eleventh Circuit.—The counties of McLean, Livingston, Logan, Ford and Woodford.

JUDGES.

COLOSTIN D. MYERS, Bloomington.
GEORGE W. PATTON, Pontiac.
JOHN H. MOFFETT, Paxton.

Twelfth Circuit.—The counties of Will, Kankakee and Iroquois.

JUDGES.

DORRANCE DIBELL, Joliet.
ROBERT W. HILSCHER, Watseka.
JOHN SMALL, Kankakee.

Thirteenth Circuit.—The counties of Bureau, LaSalle and Grundy.

JUDGES.

CHARLES BLANCHARD, Ottawa.
HARVEY M. TRIMBLE, Princeton.
SAMUEL C. STOUGH, Morris.

Fourteenth Circuit.—The counties of Rock Island, Mercer, Whiteside and Henry.

JUDGES.

HIRAM BIGELOW, Galva.
WILLIAM H. GEST, Rock Island.
FRANK D. RAMSAY, Morrison.

Fifteenth Circuit.—The counties of Jo Daviess, Stephenson, Carroll, Ogle and Lee.

JUDGES.

JOHN D. CRABTREE, Dixon.
JAMES SHAW, Mount Carroll.
JAMES S. BAUME, Galena.

COURTS OF COOK COUNTY.

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Sixteenth Circuit.—The counties of Kane, Du Page, De Kalb and Kendall.

JUDGES.

HENRY B. WILLIS, Elgin.
CHARLES A. BISHOP, Sycamore.
GEORGE W. BROWN, Wheaton.

Seventeenth Circuit.—The counties of Winnebago, Boone, McHenry and Lake.

JUDGES.

JOHN C. GARVER, Rockford.
CHARLES E. FULLER, Belvidere.
CHARLES H. DONNELLY, Woodstock.

(4) COURTS OF COOK COUNTY.

The State Constitution recognizes Cook county as one judicial circuit, and establishes the Circuit, Criminal and Superior Courts of said county. The Criminal Court has the jurisdiction of a Circuit Court in criminal and quasi criminal cases only, and the judges of the Circuit and Superior Courts are judges, *ex-officio*, of the Criminal Court.

CIRCUIT COURT.

CLERK—John A. Cooke, County Building, Chicago.

JUDGES.

EDWARD F. DUNNE,
MURRAY F. TULEY,
RICHARD S. TUTHILL,
FRANCIS ADAMS,
ARBA N. WATERMAN,
ELBRIDGE HANECY,
OLIVER H. HORTON,

JOHN GIBBONS,
RICHARD W. CLIFFORD,
THOMAS G. WINDES,
EDMUND W. BURKE,
CHARLES G. NEELY,
FRANK BAKER,
ABNER SMITH.

SUPERIOR COURT.

CLERK—John A. Linn, County Building, Chicago.

JUDGES.

HENRY M. SHEPARD,
THEODORE BRENTANO,
PHILIP STEIN,
JESSE HOLDOM,
JONAS HUTCHINSON,
AXEL CHYTRAUS,

ARTHUR H. CHETLAIN,
HENRY V. FREEMAN,
NATHANIEL C. SEARS,
FARLIN Q. BALL,
JOSEPH E. GARY,
MARCUS KAVANAGH.*

*Appointed to fill vacancy December 3, 1898.

(5) CITY COURTS.

City Courts existing prior to the Constitution of 1870 were continued until abolished by the qualified voters of the city. These courts may now be established under Sec. 21 of Chap. 87, R. S., and when so established have concurrent jurisdiction within the city, with the Circuit Courts, in all civil and criminal cases, except treason and murder, and in appeals from justices of the peace residing within the city. (*Her-cules Iron Works v. E., J. & E. Ry. Co.*, 141 Ill. 497.)

THE CITY COURT OF ALTON.

ALEXANDER W. HOPE, Judge. **FRANCIS BRANDEWIEDE**, Clerk.

THE CITY COURT OF AURORA.

RUSSELL P. GOODWIN, Judge. **JAMES SHAW**, Clerk.

THE CITY COURT OF CANTON.

W. H. HEMENOVER, Judge. **A. T. ATWATER**, Clerk.

THE CITY COURT OF EAST ST. LOUIS.

SILAS COOK, Judge. **THOMAS J. HEALY**, Clerk.

THE CITY COURT OF ELGIN.

RUSSELL P. GOODWIN, Judge. **ZACK T. VAIL**, Clerk.

THE CITY COURT OF LITCHFIELD.

AMOS OLLER, Judge. **HUGH HALL**, Clerk.

THE CITY COURT OF MATTOON.

JAMES F. HUGHES, Judge. **T. M. LYPLE**, Clerk.

(6) COUNTY AND PROBATE COURTS.

In the counties of Cook, La Salle and Peoria, each having a population of over 50,000, probate courts are established, distinct from the county courts. In the other counties the county courts have jurisdiction in all matters of probate.

JUDGES.	COUNTIES.	COUNTY SEATS.
CARL E. EPLER.....	Adams.....	Quincy.
WM. S. DEWEY.....	Alexander.....	Cairo.
JOSEPH STORY.....	Bond.....	Greenville.
WILL. C. DE WOLF, JR.....	Boone.....	Belvidere.
R. E. VANDEVENTER,.....	Brown	Mt. Sterling.
RICHARD M. SKINNER.....	Bureau.....	Princeton.
ANDREW J. EMERICK	Calhoun	Hardin.
ALVA F. WINGERT	Carroll.....	Mt. Carroll.
JOHN F. ROBINSON.....	Cass	Virginia.
CALVIN C. STALEY.....	Champaign	Urbana.
RUFUS M. Potts.....	Christian.....	Taylorville.
J. C. PERDUE.....	Clark.....	Marshall.
JOHN R. BONNEY.....	Clay	Louisville.
JOSEPH HANKE.....	Clinton	Carlyle.
JOHN P. HARRAH.....	Coles.....	Charleston.
ORRIN N. CARTER.....	Cook	Chicago.
* Pro. Judge.		Chicago.
ANSBY L. LOWE.....	Cook.....	Robinson.
ELIAS MCPHERSON.....	Cumberland.....	Toledo.
WILLIAM L. POND.....	DeKalb	Sycamore.
GEO. K. INGHAM	DeWitt	Clinton.
WM. H. BASSETT.....	Douglas.....	Tuscola.
JOHN H. BATTEN.....	DuPage.....	Wheaton.
STEPHEN I. HEADLEY.....	Edgar	Paris.
WM. McGREGOR.....	Edwards	Albion.
DAVID L. WRIGHT	Effingham	Effingham.
GEO. T. TURNER.....	Fayette.....	Vandalia.
ALEXANDER MCELROY.....	Ford	Paxton.
WM. H. HART.....	Franklin	Benton.
MEREDITH WALKER.....	Fulton	Lewistown.
GEORGE HANLON.....	Gallatin	Shawneetown.
DAVID F. KING.....	Greene	Carrollton.
A. R. JORDON.....	Grundy	Morris.
CHAS. B. THOMAS.....	Hamilton	McLeansboro.
CHELLIS E. HOOKER.....	Hancock	Carthage.
WM. J. HALL	Hardin	Elizabethtown.
RAUSELDON COOPER	Henderson	Oquawka.
CHESTER M. TURNER.....	Henry	Cambridge.
FRANK HARRY.....	Iroquois.....	Watseka.
ROBERT J. MCELVAIN.....	Jackson	Murphysboro.
L. D. SHAMHART.....	Jasper	Newton.
JOSEPH D. NORRIS.....	Jefferson	Mt. Vernon.
ALLEN M. SLATEN.....	Jersey	Jerseyville.
WM. T. HODSON.....	Jo Daviess	Galena.
O. R. MORGAN.....	Johnson	Vienna.
M. O. SOUTHWORTH.....	Kane	Geneva.
EBEN B. GOWER.....	Kankakee	Kankakee.
HENRY S. HUDSON.....	Kendall.....	Yorkville.
PHILIP S. POST.....	Knox	Galesburg.
DEWITT L. JONES.....	Lake	Waukegan.

*Office vacant. The Hon. JOHN H. BATTEN is at present acting as Probate Judge.

COUNTY AND PROBATE COURTS.

JUDGES.	COUNTIES.	COUNTY SEATS.
HENRY W. JOHNSON.....	LaSalle	Ottawa.
ALBERT T. LARDIN, Pro. J....	LaSalle	Ottawa.
JASPER D. MADDING.....	Lawrence	Lawrenceville.
RICHARD S. FARRAND.....	Lee	Dixon.
CHAS. M. BARICKMAN.....	Livingston	Pontiac.
EMIL C. MOOS.....	Logan	Lincoln.
WM. L. HAMMER.....	Macon	Decatur.
DAVID E. KEEFE.....	Macoupin	Carlinville.
WM. P. EARLY.....	Madison	Edwardsville.
CHAS. H. HOLT.....	Marion	Salem.
B. W. WRIGHT.....	Marshall	Lacon.
JAMES A. MCCOMAS.....	Mason	Havana.
GEORGE SAWYER.....	Massac	Metropolis.
J. ROSS MICKEY.....	McDonough	Macomb.
ORSON H. GILLMORE.....	McHenry	Woodstock.
ROLAND A. RUSSELL.....	McLean	Bloomington.
FRANK E. BLANE.....	Menard	Petersburg.
WILLIAM T. CHURCH.....	Mercer	Aledo.
PAUL C. BREY.....	Monroe	Waterloo.
M. J. McMURRY.....	Montgomery	Hillsboro.
CHARLES A. BARNES.....	Morgan	Jacksonville.
JOHN D. PURVIS.....	Moultrie	Sullivan.
FRANK E. REED.....	Ogle	Oregon.
ROBERT H. LOVETT.....	Peoria	Peoria.
M. M. BASSETT, Pro. Judge...	Peoria	Peoria.
R. W. S. WHEATLEY.....	Perry	Pinckneyville.
F. M. SHONKWILER.....	Piatt	Monticello.
B. F. BRADBURN.....	Pike	Pittsfield.
WM. A. WHITESIDE.....	Pope	Golconda.
JOHN D. BRISTOW.....	Pulaski	Mound City.
JOHN M. McNABB.....	Putnam	Hennepin.
WARREN N. WILSON.....	Randolph	Chester.
PARKE HUTCHINSON.....	Richland	Olney.
LUCIAN ADAMS.....	Rock Island	Rock Island.
JOHN L. THOMPSON.....	Saline	Harrisburg.
GEORGE W. MURRAY.....	Sangamon	Springfield.
H. V. TEEL.....	Schuyler	Rushville.
JAMES CALLANS.....	Scott	Winchester.
THOMAS RIGHTER.....	Shelby	Shelbyville.
WM. W. WRIGHT.....	Stark	Toulon.
FRANK PERRIN.....	St. Clair	Belleville.
WM. N. CRONKRITE.....	Stephenson	Freeport.
GEO. C. RIDER.....	Tazewell	Pekin.
MONROE C. CRAWFORD.....	Union	Jonesboro.
M. W. THOMPSON.....	Vermilion	Danville.
LYMAN LEEDS.....	Wabash	Mt. Carmel.
T. G. PEACOCK.....	Warren	Monmouth.
GEO. VERNOR.....	Washington	Nashville.
L. E. SUNDERLAND.....	Wayne	Fairfield.
JOHN N. WILSON.....	White	Carmi.
HENRY C. WARD.....	Whiteside	Morrison.
ALBERT O. MARSHALL.....	Will	Joliet.
WILEY F. SLATER.....	Williamson	Marion.
RUFUS C. BAILEY.....	Winnebago	Rockford.
THOMAS KENNEDY.....	Woodford	Eureka.

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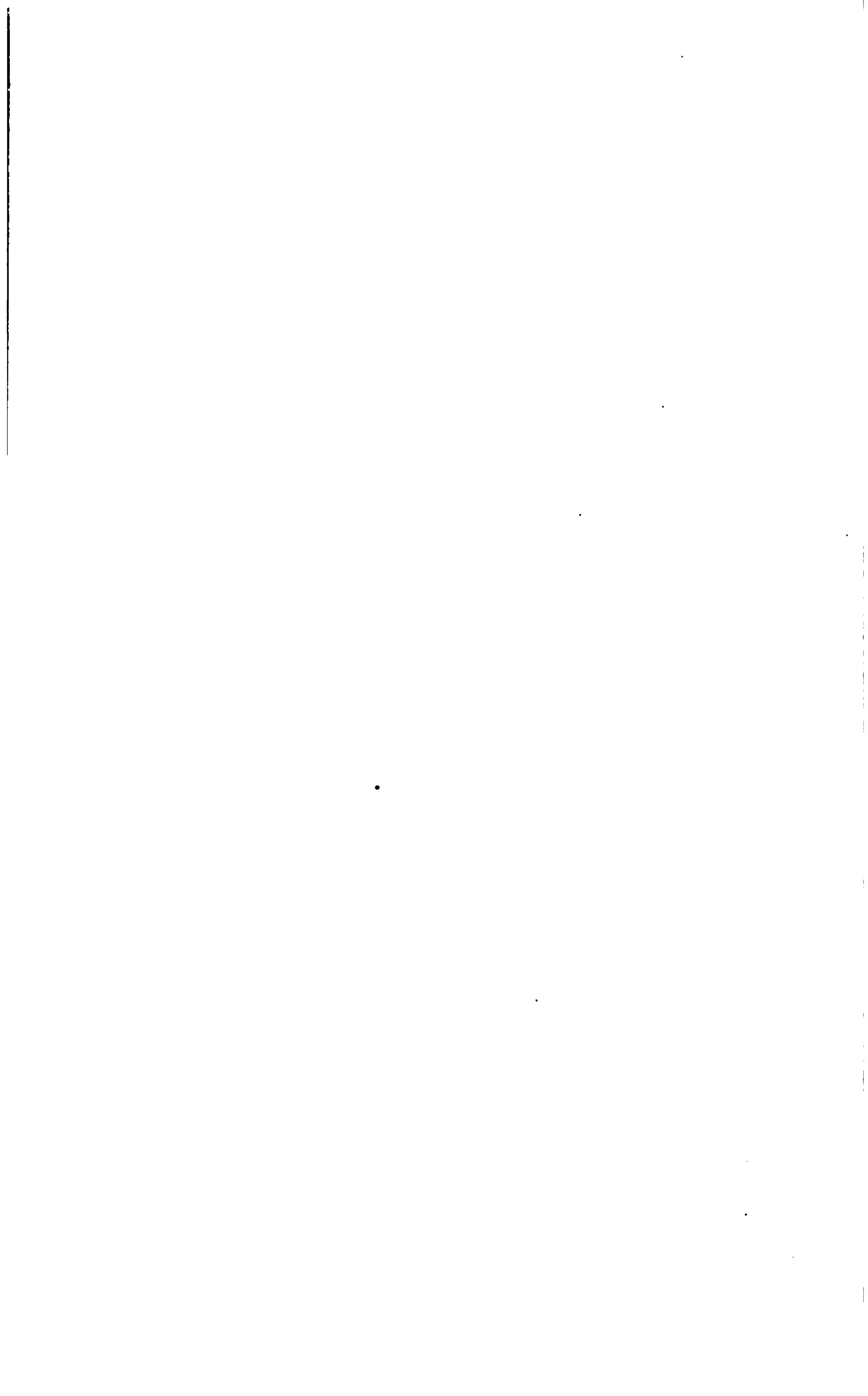


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SECOND DISTRICT—DECEMBER TERM, 1898.

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1. BILL OF EXCEPTIONS—*To be Incorporated Into the Record Only on Stipulation of Parties.*—Section 72 of the practice act requires authenticated copies of the records of the court below to be filed upon appeal. The act of 1887, concerning fees and costs, authorizes the original bill of exceptions to be incorporated in the transcript of the record in cases only where the parties to the appeal so agree.

2. SAME—*Practice Where the Bill of Exceptions is Embodied in the Record Without the Consent of the Parties.*—Where the original bill of exceptions is incorporated in the record without the consent of the parties to the appeal, a motion to strike it from the files is proper.

Motion to Strike Bill of Exceptions from the Files.—Motion allowed and judgment affirmed. Opinion filed January 10, 1899. Rehearing denied May 16, 1899.

ALLEN P. MILLER, attorney for appellants.

M. SHALLENBERGER and V. G. FULLER, attorneys for appellees.

MR. PRESIDING JUSTICE DIBELL delivered the opinion of the court.

Appellants caused the original bill of exceptions to be embodied in the record of this case certified by the clerk

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of the court below and filed here. Section 72 of the practice act requires authenticated copies of the records of the court below to be filed here upon appeal. The act of 1887 concerning fees and costs authorizes the original bill of exceptions to be incorporated in the transcript of the record where the parties to the appeal so agree. The appellees have heretofore shown to this court that they did not agree or consent that the original bill of exceptions should be incorporated in this record, but that it was done without their knowledge. Thereupon the bill of exceptions was stricken from the files, as appellees have the undoubted right to have the original bill remain among the files in the court below, where it can be examined at will. Appellants have taken no steps to cause the record to be amended and a transcript of the bill of exceptions filed. An examination of the brief and argument for appellants shows that the alleged errors argued and relied upon for a reversal grow out of the evidence and instructions and the rulings of the trial court thereon. There being no bill of exceptions now in the record these matters are not before us. It not being argued that any error appears in that part of the record remaining, the judgment appealed from will be affirmed.

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Equitable Building and Loan Society v. James P. Fritze, for Use, etc.

1. BUILDING AND LOAN ASSOCIATIONS—*Contracts Not Authorized by Law.*—A contract between the board of directors of a building and loan association and its vice-president, fixing the term of his office and his compensation as manager, is not within the powers granted or implied to the association. Such a contract is illegal and void, and it is contrary to public policy and good morals to permit it to be enforced.

2. SAME—*Legitimate Purposes of their Creation.*—The proper and legitimate purposes for which building associations are created are to enable persons to combine and invest their savings to their mutual advantage, so that from time to time any individual among them may receive,

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out of the accumulations, a sum by way of a loan, wherewith to buy or build a house, mortgaging it to the association as security for the money borrowed, and ultimately making it absolutely his own by paying off the incumbrances out of his subscriptions. It is only so far as they serve these purposes, and are confined to these objects, that their acts fall properly within the powers granted. When they transgress these limits they are *ultra vires*.

3. SAME—*Establishment of Agencies in Various States.*—The establishment of agencies in various States, with a large and scattered body of stockholders and borrowers, pledging property far beyond the personal inspection and control of the officers, is not authorized by our statute, and is outside the object for which such associations are created.

4. SAME—*Compensation of Officers.*—The law under which building and loan associations are organized provides that the officers shall consist of president, vice-president, secretary and treasurer; that the secretary only shall be entitled to compensation, in such amount as may be provided for in the charter, and is in effect an enactment that the president, vice-president and treasurer shall not be entitled to compensation.

5. CONTRACTS—*Illegal—Right of Action Under the Common Counts.*—The complete execution of an illegal contract upon one side does not give a right of action under the common counts.

Assumpsit, for services rendered. Trial in the Circuit Court of Peoria County; the Hon. THOMAS M. SHAW, Judge, presiding. Finding and judgment for plaintiff; appeal by defendant. Heard in this court at the December term, 1898. Reversed. Opinion filed May 19, 1898.

WINSLOW EVANS, attorney for appellants; JOHN J. CROWDER, of counsel.

The act of 1879, under which the defendant was incorporated, provides that whenever any number of persons, not less than five, may desire to become incorporated as a mutual building, loan and homestead association for the purpose of building and improving homesteads and loaning money to the members thereof only, they shall make a statement to that effect, under their hands and seals, duly acknowledged before some officer, etc. Laws of 1879, p. 83.

The purpose and scope of such incorporations under this statute has been expressed as follows:

“To all practical intents it may be said to be to enable a number of associates to combine and invest their savings to

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mutual advantage, so that, from time to time, any individual among them may receive, out of the accumulation of the pittances which each contributes periodically, a sum, by way of loan, wherewith to buy or build a house, mortgaging it to the association as security for the money borrowed, and ultimately making it absolutely his own by paying off the incumbrance out of his subscription. It is only so far as they serve these purposes and are confined to the objects necessarily involved therein that the acts of building associations fall properly within the powers granted. As soon as they transgress these limits they are *ultra vires.*" Rhodes v. Missouri Savings Co., 173 Ill. 621-629.

By section three of the act of 1879 the commissioners were required to report their proceedings, including therein a copy of the notices provided for in the foregoing section, a copy of the subscription list, a copy of the charter and by-laws adopted by the association, and the names of the directors elected and their respective terms of office, which report shall be sworn to by at least a majority of the commissioners, and shall be filed in the office of the secretary of State. The secretary of State was required thereupon to issue a certificate of complete organization of the corporation, making a part thereof a copy of all papers filed in his office in and about the organization of the corporation and duly authenticated under his hand and the seal of State, and the same to be recorded in the office of the recorder of deeds in the county in which the principal office of such company is located. Upon the recording of the said copy, the corporation should be deemed fully organized, etc. Laws of 1879, p. 84, Sec. 3.

By the same act, in section five, it is provided:

"The corporate powers shall be exercised by the board of directors, provided the number of directors shall not be increased or diminished or their term of office changed without the consent of the owners of two-thirds of the shares of stock. The officers of the company shall consist of a president, vice-president, secretary and treasurer, to be elected at the annual meeting of the board of directors, as may be provided for in the charter and by-laws of the association, provided that the secretary only shall be entitled to compensation, and in such amount as may be provided for in the char-

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ter of such association, and provided that the treasurer shall give bond and security to be approved by the board of directors." Laws of 1879, 284, Sec. 5.

No provision is contained in the act of 1879 authorizing or permitting the amendment of the charter or by-laws required by section three of the act, and which become a part of the society's articles of incorporation, by any act of the society itself either at a stockholders' meeting or a directors' meeting. Law of 1879, pp. 83-7.

There was no provision of the act authorizing the incorporation of building, loan and homestead associations to alter or amend its by-laws until the amendment of section three of the act, which went into force and effect July 1, 1893. By this amendment, it was provided that subsequent amendments or alterations of the by-laws should be submitted to the secretary of State and be approved by the attorney-general and be recorded in like manner as the original by-laws before the same should become operative, and only such by-laws as should have been submitted, approved and recorded as therein provided, should be deemed operative. A copy of such by-laws and amendments were required to be filed also with the auditor of public accounts. Laws of 1893, p. 84, Sec. 3.

No authority or power was given any association organized under this act by its directors or its stockholders to fix or regulate the compensation of any of its officers until the amendment of 1897, and then it was only provided that the directors might annually fix and determine the compensation of the secretary and treasurer when the same was not provided for in the by-laws. Laws of 1897, p. 167, Sec. 5 A.

The rule for construing the powers of corporations organized under general law and one created by special statute are the same. The powers especially enumerated, and such other powers as are incidental or necessary to carry those powers into effect, but none others, may be exercised by the corporation. Rockhold v. Canton Masonic, etc., Association, 129 Ill. 440; Reese on Ultra Vires, Secs. 3 and 8.

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The rule of construction applicable to statutory provisions is that every power that is not clearly granted is withheld, and that any ambiguity in the terms of the grant must operate against the corporation and in favor of the public.

And if the power claimed is withheld, it is regarded as a prohibition against the exercise of such power. American Trust Co. v. M. & N. W. R. R. Co., 157 Ill. 641.

If a power or purpose of incorporation is expressed in the certificate issued by the secretary of State that is not authorized by the act under which the corporation is incorporated, such additional power or authority is a nullity and all acts done under it are void. Granger's, etc., Ins. Co. v. Kamper, 73 Ala. 325; Oregon Ry. Co. v. Oregonian Ry. Co., 130 U. S. 1; Reese on *Ultra Vires*, Sec. 3.

Whether a corporation is created by general or special law, it may exercise only those powers expressly given it and such other powers as are necessary to carry the expressed powers into effect. Implied powers must be bounded by the purpose of the corporate existence and the terms of the charter, and acts which tend only by indirection to promote the interests and chartered objects of the corporation can not be justified by implication, but are *ultra vires*. People v. Pullman Car Co., 175 Ill. 125.

An incidental or implied power is one that is directly and immediately appropriate to the execution of the specific power granted and not one that has slight or remote relation to it. Safety Insulated Wire & C. Co. v. Mayor, etc., of Baltimore, 20 C. C. A. 453; Hood v. R. R. Co., 22 Conn. l.

A contract or act of a corporation which is *ultra vires* in the proper sense, that is to say, outside the object of its creation as defined in the law of its organization, and therefore beyond the powers conferred upon it by the legislature, is not voidable only, but wholly void and of no legal effect, and in such case, even though there has been full performance, neither party to such contract can be estopped by assenting to it or by acting upon it to show that it was void, and no recovery can be had upon it. Cent. Transpor-

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tation Car Co. v. Pullman Palace Car Co., 139 U. S. 24; Davis v. Old Colony Ry. Co., 131 Mass. 264; McCormick v. Market National Bank, 162 Ill. 100; American Trust Co. v. M. & N. W. R. R. Co., 157 Ill. 641; Durkee v. People, 155 Ill. 354; McCormick v. Market Nat. Bank, 165 U. S. 538; California Bank v. Kennedy, 167 U. S. 362; Marble Co. v. Harvey, 92 Tenn. 115; Lucas v. Whiteline Transfer Co., 70 Ia. 541; O. & M. R. R. Co. v. I & C. R. R. Co., 5 Am. Law Reg. (new series), 733.

DAN. R. SHEEN and ARTHUR KREISMAN, attorneys for appellee.

The common counts alone will lie when the work has been done and the contract executed. In an action upon an account stated, the original form of evidence of the debt is unimportant, for the stating of the account changes the character of the cause of action, and is in the nature of a new undertaking. The action is founded not upon the original contract but upon the promise to pay the balance ascertained. Throop v. Sherwood, 4 Gil. 92, 98.

Where a director performs services outside of his duties as such director, by proper employment by the board of directors, he may recover compensation for services so rendered. The board of directors has control of the property and funds of the corporation, and had they chosen to consider it part of appellee's duty as a director they would not have unanimously voted him a compensation. Holder v. L. B. & M. Ry. Co., 71 Ill. 107.

Because a plaintiff was a member of the board of directors is no reason why he should not be entitled to compensation for services performed as a duly appointed agent before the services were rendered. L. B. & M. Ry. Co. v. Cheeney, 87 Ill. 446; Cheeney v. L. B. & M. Ry. Co., 68 Ill. 575.

Even if the contract is *ultra vires*, the work was done, the same was accepted by appellant without any objection, the contract so far as appellee is concerned is executed. Under these circumstances appellant is estopped from setting up the defense of *ultra vires*.

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This is especially so when the contract is not immoral in itself, or the same is not expressly prohibited by statute. *McNulta v. Corn Belt Bank*, 164 Ill. 451; *Kadish v. G. C. E. L. & B. Ass'n*, 151 Ill. 531; *Benefit Ass'n v. Blue*, 120 Ill. 128; *Bradley v. Ballard*, 55 Ill. 415; *Darst v. Gale*, 83 Ill. 136.

A director may enter into a contract with his corporation, *Harts v. Brown*, 77 Ill. 226; *Beach v. Miller*, 130 Ill. 169; *Merrick v. Peru Coal Co.*, 61 Ill. 479.

MR. PRESIDING JUSTICE DIBELL delivered the opinion of the court.

James P. Fritze brought this action of assumpsit against appellant to recover for services rendered appellant under a written contract. He filed a special count upon the contract, and the common counts. Defendant filed several pleas, including the general issue, to some of which demurrers were sustained and upon others issues were joined. All the facts seem to have been put in evidence, and as appellee admits in argument the defenses urged could be presented under the general issue, we think it unnecessary to discuss the pleas to which demurrers were sustained.

Appellant was organized in 1890, under the act of 1879 relating to building and loan associations. At its meeting to organize it elected Fritze a director for three years, and adopted a charter and by-laws (in compliance with original section 3 of said act), which were reported to the secretary of State, and a copy thereof attached to the certificate of organization issued by that officer. These papers declared the location of the society to be Peoria, in Peoria county, Illinois. The by-laws provided for amendments at meetings of stockholders. By the by-laws a quorum at a stockholders' meeting consisted of persons owning or representing a majority of the stock. At an annual stockholders' meeting held April 21, 1892, 6,213 shares were represented and it was determined that 6,166 shares constituted a quorum. At that meeting Fritze offered an amendment

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to the by-laws authorizing the board of directors to appoint a manager who, under their direction, should appoint all agents, control and manage the agency system of the society, perform such other duties as the board might require, and attend to all publications, printing and advertising, and whose term of office and compensation should be fixed by written contract with the board, and his compensation paid out of the expense fund. This by-law was adopted at that meeting. Three days later, at the annual directors' meeting, Fritze was elected vice-president for the ensuing year, and he so acted for that year. One week later, at a directors' meeting, a motion was made that by virtue of said new by-law Fritze be appointed manager of agencies for one year from May 2, 1892, and that his compensation "for his services for the year and in liquidation of all claims" be \$300 per month, and two cents per share per month during the year on each monthly installment actually paid on each share of all stock subscribed in the twenty-fifth to the thirty-sixth series, inclusive, and that said salary and compensation be payable in sums not less than one cent per share per month on all shares in good standing in the society, and as much more as the expense fund would admit. This was carried, Fritze voting for it with the other directors. A contract was prepared and signed covering these conditions, designating Fritze as manager of agencies, and also binding the society to pay his necessary traveling expenses. It was dated May 2, 1892, and was presented to the board of directors and approved on May 14, 1892, Fritze voting for its approval with the others.

Fritze acted as manager of agencies for appellant from May 1, 1892, to May 1, 1893. Agencies either had been before established or were established by Fritze during said year at Galesburg, Decatur, Monmouth and Rock Island, in Illinois; at Davenport, Burlington and Ottumwa, in Iowa; and at places in Arkansas and elsewhere. Loans were negotiated in those places, and this was done to some extent through Fritze. Fritze terminated his connection with the society May 1, 1893. He was paid by the society upon

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said contract for services during said year \$3,129.06, and the books of the society, as they were kept by those who held office at that time, showed there was still due him as manager of agencies \$1,660, and he brought this suit to recover that balance. A jury was waived, proofs were heard and there was a finding and a judgment for plaintiff for \$1,660, from which defendant prosecutes this appeal.

Section 5 of the act under which appellant was organized provides that the officers of the society organized thereunder shall consist of president, vice-president, secretary and treasurer, and that the secretary only shall be entitled to compensation, and in such amount as may be provided for in the charter. The enactment that the secretary only should be entitled to compensation was in effect an enactment that the president, vice-president and treasurer should not be entitled to compensation. The object of this act was to provide a system of savings among members, and of loaning those savings from time to time to the members. The scheme was one of mutual co-operation among the members and officers. The common interest of each was evidently relied upon to secure all needed extension of membership. The meaning of the statute was that the system should be inexpensive. The course here pursued, and to all which Fritze was a party, was an evasion of the statute. The statute provided that the vice-president should not have compensation. At a stockholders' meeting, at which a bare quorum was present, on Fritze's motion, the office of manager of agencies was established. Then on his motion at the next directors' meeting Pillsbury was made president and Meyers secretary. Then on Meyers' motion Fritze was made manager of agencies. If Fritze collects the judgment rendered below he will have received for his year's services (not including any traveling expenses), \$4,789.06. If the board of directors can do this for the vice-president, they can establish another office for the president and still another for the treasurer, and pay each a fat salary. If the directors possess the power to thus evade the law at all, they will necessarily be tempted to

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evade it for the benefit of each other. The tendency will be to make the favors mutual. We think it self-evident that such a course will quickly absorb the contributions of the shareholders and will ruin any building and loan association. We are of opinion the contract made with Fritze was contrary to the spirit and purpose of the act, and not within the powers granted or implied to the association, and that it is contrary to public policy and good morals to permit the unexecuted part to be enforced. If the service he performed was not a duty pertaining to his office as vice-president, then it was a duty which should have been performed by the president or treasurer, who could not be paid therefor, or by the secretary, who was paid for the services attached to his office. If the society could not pay the president, it would be an evasion of the law for it to pay another to perform his duties. The contract says the payment to be made thereunder is also "in liquidation of all claims," and it is suggested there may have been some former services Fritze had rendered for which the society might legitimately pay him said sum. There is no proof he ever rendered any prior services for which he was entitled to be paid, or had any prior claim, and he was a director of the society from its inception.

Our Supreme Court in *Rhodes v. Missouri Savings Co.*, 173 Ill. 621, quotes approvingly from Endlich on Building Associations, that the proper and legitimate purposes of the creation of such a corporation are "to enable a number of associates to combine and invest their savings to their mutual advantage, so that from time to time any individual among them may receive out of the accumulation of the pittances to which each contributes periodically a sum by way of loan wherewith to buy or build a house, mortgaging it to the association as security for the money borrowed, and ultimately making it absolutely his own by paying off the incumbrances out of his subscriptions. It is only so far as they serve these purposes and are confined to these objects legitimately involved therein that the acts of building associations fall properly within the powers granted. As soon

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as they transgress these limits they are *ultra vires*." Endlich, 2d Ed., Sec. 276.

We are of opinion that the establishment of many agencies in various States, with a large and scattered body of stockholders and of borrowers, pledging property far beyond the personal inspection and control of the officers, was not contemplated by our statute, and that the business in which Fritze was engaged, under this contract, was outside the object for which appellant was created, and that he, a director and vice-president, can not be permitted to profit thereby.

Appellee argues that the book accounts of appellant, which he put in evidence, made a case for him under the common counts, regardless of the contract. We do not concur in this position. The ledger account in evidence showed all appellee's credits thereon were for salary and commissions, and these credits were journalized as being for salary and a percentage on renewals. Appellee's other proof showed he held an office under appellant for which the statute provided he should not receive a salary. On the face of that proof these credits were for that for which the law provided he should not be paid. Appellee could not and did not submit his case upon the books alone, but put the contract in evidence. The contract was a necessary part of his case. (Walker v. Brown, 28 Ill. 378.) In our judgment that contract was illegal and void. Complete execution of such a contract upon one side does not give a right of action under the common counts. (American Strawboard Co. v. Peoria Strawboard Co., 65 Ill. App. 502.) In the case last cited a right to recover under the common counts was asserted, though the contract was illegal. We there held that to allow such a recovery, "would be to practically nullify the statute, and enable parties, by resorting to mere form, shifts and devices, to accomplish indirectly what they have no lawful right to do directly." When the contract in this case was offered in evidence, appellant objected that it was without authority of law and void. The objection was overruled, and appellant excepted. It is assigned for error, among other things, that the court

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erred in admitting improper evidence over the objection of appellant; that the finding of the court was not supported by the evidence, and that the court erred in rendering judgment. Under these assignments we hold the court should not have admitted the contract, and that appellee could not recover without it; that the court should not have found for appellee, and should not have rendered judgment for appellee.

This record raises the further question of law whether the society could pass an amendment to its by-laws, prior to the act of 1893, amending section 3 of the building and loan association act; and also the question of fact whether the proof shows Fritze entitled to the commissions he claimed and whether the expense fund contained \$1,660 out of which he can be paid pursuant to his contract; but as we are of opinion that the contract was *ultra vires*, and an evasion of the statute, and that on grounds of public policy plaintiff ought not to be permitted to recover, it seems unnecessary we should pass upon these other questions. Under the circumstances no finding of fact need be incorporated in the judgment here. Our judgment is not based upon a determination of the facts different from the finding of the Circuit Court, but upon our legal conclusion that the contract was void. The judgment will be reversed.

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**John M. Costello and D. F. Sargent v. Frank Harbaugh,
Assignee.**

1. **BANKRUPTCY—Power of Congress to Establish a Uniform System.**—The fourth clause of Section 8 of Article 1 of the Constitution of the United States grants to Congress the power “to establish uniform laws on the subject of bankruptcies throughout the United States.”

2. **SAME—Limits of the Jurisdiction of Congress.**—The jurisdiction of Congress extends to all cases where the law causes to be distributed the property of the debtor among his creditors; this is its least limit. Its greatest, is the discharge of the debtor from his contracts. And all intermediate legislation affecting substance and form, but tending to further the great end of the subject—distribution and discharge—are in the discretion of Congress.

3. **SAME—Doctrine of the Federal Courts.**—It is the doctrine of the Federal courts that all judicial proceedings, whether voluntary or involuntary, for the distribution of the effects of an insolvent debtor among his creditors, are subject to the paramount control of Congress when it chooses to legislate upon the subject; and that when it acts the power of the State and the jurisdiction of its courts are in abeyance.

4. **SAME—Suspension of State Insolvency Laws.**—As soon as a national bankruptcy act goes into effect all State assignment and insolvency laws become suspended and remain entirely inoperative while the national act is in force, so far as they cover the same subjects as the bankruptcy act, and the jurisdiction of State courts under such State laws is in abeyance during that period, regardless of the question whether proceedings in bankruptcy have been instituted or not.

5. **INSOLVENCY LAWS—When Not Affected by Federal Bankruptcy Laws.**—Proceedings commenced under State insolvency laws before the passage of the bankruptcy law of 1898 are not affected by it.

6. **SAME—State and Federal Systems.**—The two systems, State and Federal, act upon the same subject-matter, and persons, both debtors and creditors, have the same rights, and generally have the same object, the equal distribution of the debtor's assets among all his creditors; and both can not go on without collision.

7. **SAME—State Assignment Act and the Federal Bankruptcy Act can Not Stand Together.**—The State statute and the bankruptcy act can not stand together. The bankruptcy act is the supreme law of the land, enacted in pursuance of an express grant of constitutional authority; and, in so far as any State law is in conflict with it, such law is suspended and remains inoperative until the Federal enactment is repealed. And until then all matters embraced in it must be governed by its provisions.

8. **SAME—Power of State Courts Suspended.**—The operation of the State Law is suspended, and the State courts are without jurisdiction or authority to administer the estates of bankrupts or insolvents.

9. **VOLUNTARY ASSIGNMENT—An Act of Bankruptcy.**—By making an assignment for the benefit of creditors under the State law a person commits an act of bankruptcy under the act of 1898.

10. **BANKRUPT ACT—When it Went Into Force.**—The national bankrupt act, by its terms, went into full force and effect upon its passage July 1, 1898, notwithstanding the provision that no voluntary petition should be filed within one month of the passage of the act, and that no petition for involuntary bankruptcy should be filed within four months of the passage of the act. It was operative from the date of its passage, and was effective from that date to supersede the insolvency laws of the several States.

11. **STATE COURTS—Power of, in Voluntary Assignments.**—Under an assignment made on the 16th day of July, 1898, the County Court is without jurisdiction to enter an order requiring a constable to show cause why an order should not be entered requiring him to surrender to the assignee property of the assignor distrained for rent.

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Voluntary Assignment.—Appeal from the County Court of Henry County; the Hon. A. R. MOCK, Judge, presiding. Heard in this court at the December term, 1898. Reversed. Opinion filed May 19, 1899.

GRAVES & BROWN, attorneys for appellants.

GEORGE E. WAITE, JOHN P. HAND and GEORGE W. SHAW, attorneys for appellee.

MR. PRESIDING JUSTICE DIBELL delivered the opinion of the court.

On July 16, 1898, Alexander White, of Henry county, an insolvent, made an assignment for the benefit of his creditors to Frank Harbaugh. The latter accepted the trust in writing, filed the assignment and acceptance of record, presented the assignment to the County Court of Henry County, gave bond which that court approved, and entered into the exclusive possession of the property assigned, a stock of hardware in a store in Geneseo. Thereafter D. F. Sargent, claiming White owed him \$325 for rent of the store building, issued a distress warrant for said rent, and placed it in the hands of John M. Costello, a constable. Costello seized the store and goods and excluded Harbaugh therefrom. Harbaugh presented the facts to the County Court by petition, and it cited Costello and Sargent to show cause why an order should not be entered requiring them to surrender the property to the assignee. Costello and Sargent demurred to the petition on the ground that our State assignment law had been superseded by the national bankruptcy law of July 1, 1898, and that the County Court had no jurisdiction to act in the matter. The demurrer was overruled. Costello and Sargent did not answer further. They were defaulted, and the County Court entered an order that they surrender the property to the assignee. This is an appeal from that order. If the County Court had jurisdiction of the assignment and power to act under the State assignment law, the order entered was proper, under Wilson v. Aaron, 132 Ill. 238, and other cases. The question is whether, since

July 1, 1898, the County Court has and may exercise, in cases of assignments made since that date, the jurisdiction conferred upon it by the State assignment law.

Congress passed bankruptcy acts in 1800, 1841, 1867 and 1898. Each was based upon the fourth clause of Section 8 of Article 1 of the Constitution of the United States, which grants to Congress the power "to establish * * * uniform laws on the subject of bankruptcies throughout the United States." In English law, the source of our common law, bankruptcy was a proceeding instituted by the creditor against an insolvent trader only, and was distinguished from the volunteer efforts of a debtor to surrender his property to his creditors, and from proceedings against a debtor who was not a trader. It was early contended that the term "bankruptcies," in the Federal Constitution, was thus limited in meaning, and that the national bankruptcy acts were unconstitutional, so far as they permitted proceedings by the debtor, and against a debtor not a trader. After the judicial discussion of this subject in *Kunzler v. Kohans*, 5 Hill, 317; *Sackett v. Andross*, 5 Hill, 327; *Nelson v. Carland*, 1 How. 265; and *In re Klein*, by Catron, J., upon the circuit, published in 1 How. 277, the views of Judge Catron seem to have been generally adopted and the wider meaning of "bankruptcies" applied to that term in the Federal Constitution. In discussing the question as to what limits the jurisdiction of Congress was restricted by the term "bankruptcies," Catron, J., there said: "It extends to all cases where the law causes to be distributed the property of the debtor among his creditors; this is its' least limit. Its greatest, is a discharge of the debtor from his contracts. And all intermediate legislation affecting substance and form, but tending to further the great end of the subject—distribution and discharge—are in the competency and discretion of Congress. * * * I deem every State law a bankrupt law, in substance and in fact, that causes to be distributed by a tribunal the property of a debtor among his creditors; and it is especially such if it causes the debtor to be discharged from his contracts, within the limits

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prescribed by the case of *Ogden v. Saunders*, 12 Wheat. 213. Such a law may be denominated an insolvent law; still it deals directly with the subject of bankruptcies, and is a bankrupt law in the sense of the Constitution; and if Congress should pass a similar law it would suspend the State law while the act of Congress continued in force." Since that decision it is the doctrine of the Federal courts, and of most others, that all judicial proceedings, whether voluntary or involuntary, for the distribution of the effects of an insolvent debtor among his creditors, are subject to the paramount control of Congress when it chooses to legislate upon the subject; and that when it acts the power of the State and the jurisdiction of its courts are in abeyance.

Two different theories have, however, been adopted as to the time when the authority of the State and the jurisdiction of its courts cease. One doctrine is that as soon as a national bankruptcy act goes into effect all State assignment laws and State insolvency laws become suspended and remain entirely inoperative while the national act is in force, so far as they cover the same subjects as the bankruptcy act, and that the jurisdiction of State courts under such State laws is in abeyance during that period, and that regardless of the question whether proceedings in bankruptcy have been instituted. This principle had its origin in a declaration *arguendo* by Chief Justice Marshall, in *Sturges v. Crowninshield*, 4 Wheat. 122. The following cases substantially support this position: *Blanchard v. Russell*, 13 Mass. 1; *Judd v. Ives*, 45 Mass. 401; *Griswold v. Pratt*. 50 Mass. 16; *Chamberlain v. Perkins*, 51 N. H. 336; *Rowe v. Page*, 54 N. H. 190; *Damon's Appeal*, 70 Maine, 153; *In re Reynolds*, 8 R. I. 485; *Van Nostrand v. Carr*, 30 Md. 128; *Lavender v. Gosnell*, 43 Md. 153; *Cassard v. Kroner*, 4 B. R. 569; *Tobin v. Trump*, 3 Brewst. 288; *Martin v. Berry*, 37 Cal. 208; *Ex parte Eames*, 2 Story, 222; *Thornhill v. Bank*, 1 Woods, 1; *Platt v. Archer*, 9 Blatchf. 559; *In re Merchants Insurance Co.*, 3 Biss. 162; *In re Langley*, 1 B. R. 559; *In re Independent Insurance Co.*, 6 B. R. 260; and the following decisions under the present

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bankruptcy law, viz.: Parmenter Manufacturing Co. v. Hamilton, (Mass.) 51 N. E. 529; *In re Curtis*, 91 Fed. 737 (S. Dist. of Ill., Allen, J.); *In re Smith*, 92 Fed. 135 (Dist. of Ind., Baker, J.); *In re Bruss-Ritter Co.*, 90 Fed. 651 (E. Dist. of Wis., Seaman, J.); *In re Etheridge Furniture Co.*, 92 Fed. 329 (Dist. of Ky., Barr, J.). The other doctrine is that the State laws remain in force and the State courts retain and may exercise jurisdiction thereunder until a court of bankruptcy has adjudged the debtor a bankrupt and seeks to assert dominion over the distribution of his estate among his creditors, at which time, and not till then, the State laws become suspended as to said debtor, and the State courts must relinquish or cease to have jurisdiction over that particular debtor and the distribution of his estate among his creditors. This position has the support, to a greater or less extent, of the following authorities: *In re Ziegenfuss*, 24 N. C. 463; Hawkins' Appeal, 34 Conn. 548; *Maltbie v. Hotchkiss*, 38 Conn. 80; Geery's Appeal, 43 Conn. 289; *Beck v. Parker*, 65 Pa. St. 262; *Shyrock v. Basehore*, 82 Pa. St. 159; *Reed v. Taylor*, 32 Iowa, 209; and under the present bankruptcy law, *In re Stivers*, 91 Fed. 366 (E. Dist. of Mo., Adams, J.). Other cases upon either side of this question are collated in Bump on Bankruptcy, 11th Ed., pp. 96 to 102, and Collier on Bankruptcy, pp. 427 to 432. The decisions *pro* and *con* can not be reconciled.

It is contended that the Supreme Court of the United States in *Mayer v. Hellman*, 91 U. S. 496, has sustained the continued operation of the State assignment laws and the jurisdiction of the State courts thereunder while a national bankruptcy act is in force. That case arose in Ohio, which had an assignment law much resembling our own, and some things said in the opinion favor the conclusion suggested, but the opinion does not so decide. The case was that while the bankruptcy act of 1867 was in force certain debtors made an assignment for the benefit of creditors, and the estate was administered in the Probate Court under the State assignment law. More than six months after the assignment, and after the time had expired when the valid-

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ity of said assignment could be assailed in bankruptcy proceedings (Act of 1867, Sec. 35), said debtors were put into bankruptcy. Thereafter the assignee in bankruptcy began that proceeding to compel the State assignee to turn over to him the assets. The Supreme Court held the assignment good at common law, and that after that lapse of time there was no property in the hands of the State assignee which the assignee in bankruptcy could claim, and that the question whether the bankrupt law of Congress suspended proceedings under the State law, though argued, was not involved. The court held the assignment was to be treated as if the State law was not in existence. *Boese v. King*, 108 U. S. 379, goes no further. In *Tua v. Carriere*, 117 U. S. 201, the doctrine is distinctly recognized that State insolvent laws are suspended and inoperative while a bankruptcy act is in force. That our statute regulating voluntary assignments is a general insolvent law was held in *Hanchett v. Waterbury*, 115 Ill. 220.

Section 71b, of the present bankruptcy act, is as follows:

“Proceedings commenced under State insolvency laws before the passage of this act shall not be affected by it.”

The inference is obvious that Congress intended the act should affect such proceedings commenced thereafter.

In some of the cases cited which sustain the continued efficiency of State laws while a bankruptcy act is in force, that conclusion is based upon provisions of the State law to secure equality of distribution of the estate among creditors, and upon the absence from the State law under discussion of any provision for the discharge of the debtor from his debts. The assignment law of Illinois has these features. It is argued that in such States there is no conflict between the spirit and purpose of the State law and of the bankruptcy act. This contention was, we think, answered by what was said concerning the bankruptcy act of 1867, in *Chamberlain v. Perkins, supra*;

“The two systems act upon the same subject-matter, upon the same persons, both debtors and creditors, upon the same rights and generally have the same object, namely,

the equal distribution of the debtor's assets among all his creditors; and it is very obvious both can not go on without collision. In accomplishing the objects of both systems different means are used. Under the State law the assignee is selected by the debtor alone; by the bankrupt law he is chosen by the creditor. To enforce a faithful surrender and application of all the debtor's assets, and, generally, to insure the good faith and fair dealing of the bankrupt, the avoiding of fraudulent preferences, and to insure an equitable distribution of all his assets, the provisions of the bankrupt law are very stringent and effective. Under the provisions of the Federal Constitution, and from the nature of the case, the law of Congress must be paramount. The two systems can not stand together; it would be totally inconsistent with that uniformity which it was the object of the Constitution to establish."

So also in the case entitled *In re Smith, supra* (under the bankruptcy act of 1898), the court, after stating the provisions of the State assignment law of Indiana, further said:

"This statute constitutes an insolvency law, and regulates the making of an assignment, which must embrace all the property of the debtor, as well as every step to be taken in winding up the estate of the bankrupt, to the distribution of its proceeds among those entitled to share therein, all to be administered in a State court possessed of general jurisdiction at law and in equity. * * * The State statute and the bankruptcy act can not stand together. The bankruptcy act is the supreme law of the land, enacted in pursuance of an express grant of constitutional authority; and, in so far as any State law is in conflict with it, such law is suspended and remains inoperative until the Federal enactment is repealed. All matters embraced in the bankruptcy act must be controlled and governed by its provisions. Among these are the right and duty of the bankruptcy court to have insolvent estates settled in and by it, under and in accordance with the provisions of the bankruptcy act; to have acts of bankruptcy affecting the settlements of estates determined by it (section 3); to have the rights of debtors to file voluntary petitions, and of creditors to file involuntary petitions, determined by it (section 4); and to have liens and preferences governed by it (sections 60, 67). These and various other provisions of the bankrupt act affecting the conduct and rights of debtors and creditors, are different from those found in the statute of this State touching gen-

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eral assignments. In my opinion, the operation of the State law is suspended, and the State courts are without any jurisdiction or authority to administer the estates of bankrupts or insolvents."

In our judgment the decided weight of judicial authority sustains the position that the power of the State courts to act under State assignment and insolvent laws is wholly suspended while a national bankruptcy act is in force. We think this conclusion best adapted to avoid confusion and judicial conflict and to make the national bankrupt act "uniform," as the Constitution designed it should be. By making this assignment for the benefit of creditors White committed an act of bankruptcy under the present bankrupt act. The design of the Federal law is to provide a mode by which the property of an insolvent may be divided *pro rata* among his creditors. The authorities which contend that the State law remains operative, and that the State courts retain and can exercise jurisdiction, concede that the instant the Federal court has adjudged the debtor a bankrupt the State court must surrender the property and cease to exercise jurisdiction. Under this position we have not a uniform law governing the subject, but as many different laws as there are States of the Union, and in addition one paramount law to which they must all yield when, and only when, the jurisdiction of the Federal court is invoked. We fail to see that such a system meets the constitutional requirement of uniformity. It moreover violates the rule that when different courts have power to take jurisdiction of and administer property the court which first acquires the property will retain and administer it to the exclusion of others. If, however, upon the enactment of a national bankruptcy law, the judicial distribution among creditors of the property of insolvent debtors, who desire their property distributed to their creditors, and of insolvent debtors who have been guilty of an act of bankruptcy, is committed exclusively to the courts of bankruptcy appointed by such law, then we have a uniform system by which such distribution may be effected through the medium of courts.

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This record, however, presents another question. The present bankruptcy act was approved July 1, 1898. Section 71a, thereof, is as follows: "This act shall go into full force and effect upon its passage: Provided, however, that no petition for voluntary bankruptcy shall be filed within one month of the passage thereof, and no petition for involuntary bankruptcy shall be filed within four months of the passage thereof." This assignment was made and filed in the County Court, and the assignee's bond approved by said court, during July, 1898. Section 50 of the bankruptcy act of 1867, approved March 2, 1867, was as follows:

"This act shall commence and take effect as to the appointment of officers created hereby and the promulgation of rules and general orders from and after the date of its approval: Provided, that no petition or other proceeding under this act shall be filed, received or commenced before the first day of June, 1867."

It was held in *Martin v. Berry*, 37 Cal. 208; *Chamberlain v. Perkins*, 51 N. H. 336, and *Day v. Bardwell*, 97 Mass. 246, that the insolvent laws of the State were not superseded by that bankruptcy act till June 1, 1867. This contention was rejected by the Federal court of Ohio. *In re Langley*, 1 B. R. 559. The decisions in the State courts just cited are in part predicated upon the argument that the provision in the act of 1867, that "this act shall commence and take effect as to the appointment of officers created hereby and the promulgation of rules and general orders from and after the date of its approval," implies that it was not to take effect at that time as to the other respects concerning which no special provision was made, and was only intended to allow preliminary arrangements to be made so that the complete system might be put into effect at once when the time for instituting judicial proceedings should arrive. It may well be assumed that these provisions of the prior bankruptcy act and these judicial constructions thereof were in the minds of the framers of the act of 1898, and that they designed to leave no question open as to the time it should take effect when they enacted that it should go into full force and effect upon its passage, and that proceedings begun

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under State insolvency laws before its passage should not be affected by it. We conclude Congress purposely excluded the construction put upon the former act and designed State insolvency laws should be wholly superseded and rendered inoperative on July 1, 1898. In the case entitled *In re Rouse, Hazard & Co.*, 91 Fed. 96, the Circuit Court of Appeals, Seventh Circuit, by Jenkins, J., said: “The bankrupt act, by its terms, went into full force and effect upon its passage, July 1, 1898, and notwithstanding the provision that no voluntary petition should be filed within one month of the passage of the act and that no petition for involuntary bankruptcy should be filed within four months of the passage of the act, the bankrupt law was operative from the date of its passage, and was effective from that date to supersede the insolvency laws of the several States.” (*In re Bruss-Ritter Co.*, 90 Fed. 651.) Whether the act furnished a sufficient remedy during July, 1898, is a question for the law making power only. “There is no vested right in suitors to have the courts open at all times either to entertain their actions or afford hearings without delay.” Congress might have provided petitions in bankruptcy should only be filed in term time, and might thus have caused a temporary delay, but that would not have prevented the law from becoming the sole law upon the subject to the exclusion of the State laws.

Very likely the assignment to Harbaugh was valid at common law. It may be the assignee could have recovered the goods by replevin, but this was a summary proceeding of which the County Court had jurisdiction only by virtue of our State assignment law. We conclude it is in harmony with the greater weight of judicial authority and the sounder reasons to hold that law inoperative and the jurisdiction of the County Court thereunder suspended while the national bankruptcy act is in force. It follows that the court below had no jurisdiction to make the order in question, and it is therefore reversed.

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Thomas D. Catlin v. The Traders Ins. Co.

1. **EXPERT TESTIMONY—Competency.**—For the purpose of determining whether the circumstances connected with the presence of canning machinery and its attachments materially increases the danger of fire, requires a degree of knowledge not possessed by an ordinary jury, and a party has a right to present the opinions of experts upon the question.

2. **SAME—Competency in Insurance Cases.**—In an action against a fire insurance company to recover the insurance upon buildings destroyed by fire, for the purpose of determining whether, at the time of the fire, the hazard was greater than when the insurance was written, by reason of changes made in the buildings by the insured without notice to the insurer, it is competent for the company to show all the facts connected with changes in the use of the buildings, and if it requires special knowledge to understand how such changes affected the risk, it is proper to have the same explained by those who have special knowledge.

3. **SAME—Hypothetical Questions.**—All material undisputed facts bearing upon the matter, concerning which the opinion of the witness is sought, should be included in the hypothetical question.

4. **SAME—Objections to, Must Point Out Facts Omitted.**—Counsel objecting to hypothetical questions should point out what admitted fact he claims to be improperly omitted, so that if the court holds the objection good the defendant may amend the question.

5. **SAME—Sufficiency of the Evidence for a Basis.**—Where there is any evidence tending to establish a fact, a party has a right to base a hypothetical question upon such evidence, regardless of the preponderance of evidence upon the subject. He is not obliged to accept the theories of the opposite party as to what the evidence tends to prove.

6. **DEPOSITIONS—Objections to Questions—When to be Made.**—Objections to evidence contained in depositions which can be obviated by amending the question, asking another question or retaking the deposition, can not be presented for the first time at the trial.

7. **EVIDENCE—General Customs Among Insurance Companies.**—It is competent to prove a general custom among insurance companies to refuse a risk on a canning factory, but not a private practice of a single company, of which the insured had no notice.

8. **ESTOPPEL—By Stipulation of Parties Litigant.**—Where the parties to an action at law make an agreed statement, none of the matters so agreed to can be disputed on the trial by either party.

9. **DEFENSES—Increase of Hazard—Insurance—Burden of Proof.**—Where the defense in a suit upon a policy of insurance is wholly devoted to showing that the plaintiff's tenant, after the insurance and without notice to the company, did certain things forbidden by the policy, the result of which was to make the hazard greater at the time of the fire than when the insurance was written, the burden is upon defendant to sustain such defense by a preponderance of the evidence.

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10. INSTRUCTIONS—*Preponderance of Evidence Where the Facts are Agreed Upon.*—Where the parties stipulate everything necessary to make a *prima facie* case for the plaintiff, an instruction that the plaintiff must prove his case by a preponderance of the evidence, and unless the jury believe that the greater weight of evidence is in his favor, their verdict should be for the defendant, is erroneous and calculated to mislead.

Assumpsit, on a policy of insurance. Trial in the Circuit Court of La Salle County; the Hon. CHARLES BLANCHARD, Judge, presiding. Verdict and judgment for defendant: error by plaintiff. Heard in this court at the December term, 1898. Reversed and remanded. Opinion filed May 19, 1899.

D. B. Snow, attorney for plaintiff in error; W. H. HINEBAUGH and W. C. Snow, of counsel.

THOMAS BATES and GOODRICH, VINCENT & BRADLEY, attorneys for defendant in error; WILLIAM A. VINCENT, of counsel.

MR. PRESIDING JUSTICE DIBELL delivered the opinion of the court.

This case and another tried with it are reported as Traders Insurance Company v. Catlin, in 59 Ill. App. 162; 163 Ill. 256; 71 Ill. App. 569. Those opinions give a history of the case and the material provisions of the policy in suit. After our last decision, the case against the Traders Insurance Company was tried alone by a jury. Much additional testimony was introduced on each side, and there was a general and a special verdict for defendant and judgment thereon. Plaintiff prosecutes this writ of error to reverse said judgment. The policy was upon a dwelling house, a carriage house, a farm barn and a granary and certain machinery, all owned by Catlin. After the policy was issued Miller, tenant of the farm, without notice to the insurance company, introduced into a room eighty feet square and thirty-four feet high, in the corner of the barn, machinery for canning his corn, sunk a gasoline tank in the barn-yard seventy-two feet from the barn, placed gasoline therein, and, by means of air forced over the gasoline by a

blower operated by the machinery covered by the policy, conducted gas therefrom in a pipe to the canning machinery to heat the irons for soldering cans, operated the canning machinery about ten days, and suspended operations to wait for the corn to become riper. The canning had been suspended and the machinery idle for five days when that part of the barn most remote from the canning machinery and tank took fire and the barn, granary and machinery were destroyed. This is a suit by Catlin upon the policy to recover the loss. The chief question of fact at the trial was whether the presence of the canning machinery, gasoline tank and gasoline caused the risk of fire to be greater at the time of the fire than it was when the insurance was written.

Hypothetical questions were propounded by defendant to its expert witnesses. Many of these questions, after stating the supposed case, asked the witness whether or not at the time of the fire the hazard was increased. It is argued these interrogatories were erroneous, because they presented to the witness the very question to be decided by the jury and permitted him to usurp the province of the jury. We consider this contention settled in this State by the opinion of our Supreme Court in this case. (163 Ill. 256.) It was there, in effect, held that to determine whether the circumstances connected with the presence of the canning machinery and its attachments materially increased the danger of fire, required a degree of knowledge not possessed by an ordinary jury, and therefore defendant had the right to present the opinions of experts upon that question. This is in harmony with the rule prevailing in this State in other cases. In a condemnation case the jury have only to decide the value of the land proposed to be taken; yet witnesses qualified to give an opinion upon that subject are permitted to testify what, in their opinion, the land is worth. So, on a cross-petition in such a case, persons having the necessary knowledge are allowed to testify whether, in their opinion, defendant's land not taken is depreciated in value by the taking of that part condemned, and if so, how much; yet

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those are the only questions the jury are to determine upon the cross-petition. Like opinions upon the very matter in issue are received as to the mental capacity of a testator or grantor. (See also James v. Johnson, 12 Ill. App. 286; Henry v. Hall, 13 Ill. App. 343.) We hold the objection not well taken.

Other hypothetical questions put by defendant inquired whether the risk was increased while the canning machinery was in operation, and it is argued this was incompetent. The ultimate question to be decided was whether, at the very time of the fire, the hazard was greater than when the insurance was written; yet we think it was competent for defendant to show all the facts connected with Miller's change in the use of the building. If the jury had possessed sufficient knowledge to understand how the operation of the canning plant affected the hazard, the mere narration of the facts would have informed the jury that the risk was or was not at that time increased. If it was proper to prove the facts, then, as it requires special knowledge to understand how the facts affected the risk, it was proper to have that explained by those who had the special knowledge. The opinion of our Supreme Court in this case treats this evidence as competent.

It is argued these hypothetical questions omitted many material facts proven and not denied. We concede the rule contended for that all material undisputed facts bearing upon the matter concerning which the opinion of the witness is sought should be included in the hypothetical question. But the objection now made was not presented in the court below. Most of the objections to the hypothetical questions were either general, or that the question was "incompetent, irrelevant and immaterial." These objections did not go to the form of the question or apprise the court or opposite counsel that material facts were omitted. Once only, so far as we discover, plaintiff objected to such a question as "not embracing all the admitted facts," but even this did not point out what admitted fact plaintiff claimed was omitted. That question covered nearly three

typewritten legal cap pages. The trial judge had no means of knowing upon what supposed omission he was required to rule. We do not think counsel could, by such an objection, cast upon the judge the burden of scrutinizing each part of this long question and then studying the agreed statement of facts (which itself covered five and a half typewritten pages), to see if he could discover some material admitted fact not embodied in the question. Plaintiff should have pointed out what he claimed was improperly omitted. Then if the court held the objection valid the defendant could have amended the question. Moreover, where there is any evidence tending to establish a fact a party has a right to base his hypothetical question upon that evidence, regardless of the preponderance of the evidence upon that subject (Rogers on Expert Testimony, Sec. 27), and he is not obliged to accept the theories of the opposite party as to what the evidence tends to prove. Under this rule many of these hypothetical questions were free from the objection now urged. Some of them, however, were not proper. For instance, the question put to the witness Dudley, assumed that this was an ordinary hay and stock barn, made no allusion to the shafting and machinery in it when the insurance was effected described in the policy, and asked whether by the introduction of the canning machinery the risk was "changed from that of an ordinary frame, hay and stock barn." For reasons appearing more fully hereafter this was an unfair omission, and the case put hypothetically was not the case before the jury. So, too, there were many inquiries as to the use of oil, rags and oily waste about the canning machinery and its effect upon the risk without any reference to the extent to which the same articles were required by the machinery covered by the insurance. The extent, if any, to which the use of oil, rags and oily waste was increased was the only respect in which such an inquiry would aid the jury, and defendant, having the burden of proof, should have furnished the evidence necessary to enable the jury to make the comparison.

Defendant was permitted to prove by the witness Bowman,

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over plaintiff's objection, a conversation between Miller and one of his employes at the railroad depot, two or three days before the fire, in which the employe claimed \$3 more than Miller paid him for his labor and threatened to get even with Miller; and also further threats against Miller made by the employe in the hearing of Bowman out of the presence of Miller. There was no evidence that this man had worked at the canning business or that his dissatisfaction was in any way connected with the placing or operating of the machinery for canning. Defendant had already proved by Miller, on his cross-examination, that he had trouble with one employe who claimed more pay than was due him, and that said employe had never worked at canning, but worked in the field. In our judgment this evidence was incompetent and prejudicial to plaintiff. But defendant's next witness, Hein, testified to a like conversation between Miller and one of his employes, in which a like threat was made, on the same subject at about the same time, and which, from Miller's testimony, was probably with the same man, and plaintiff did not object. As the complaint and threat of the employe testified to by Hein went to the jury without objection, we do not consider the error in admitting the evidence of Bowman would justify a reversal.

Our attention is called to a number of leading, suggestive and improper questions propounded by defendant to its witnesses. These were not hypothetical, but assumed as facts conditions of which there was no proof, and were calculated to impress the jury with the belief that such proof had been introduced. They also suggested to the witness theories for his adoption, and there was in many cases a reply of the kind suggested. But the objections interposed were general, and not that the questions were leading and suggestive, and assumed the existence of that which was not proven. We think the objections insufficient to avail plaintiff here. So far as said questions were contained in depositions, the defects were not pointed out by objections made when the depositions were taken so that the questions could be amended, and plaintiff did not, before the trial, move

to suppress the questions and answers thereto; and it was too late at the trial to make special objections. Objections to evidence contained in depositions which can be obviated by amending the question, asking another question or retaking the depositions, can not be presented for the first time at the trial. (Kimball v. Cook, 1 Gilman, 423; Moshier v. Knox College, 32 Ill. 155; Goodrich v. Hanson, 33 Ill. 498; Kassing v. Mortimer, 80 Ill. 602.) Moreover, each side was guilty of this fault. One side assumed in its questions that this was "an idle canning factory," instead of leaving that question to the jury. The other side equally invaded the province of the jury by assuming in its questions that this canning machinery, with gasoline tank attached, was mere "cold iron and steel." These are but examples of many improper assumptions by counsel in their questions.

Defendant was permitted to prove by several witnesses, over plaintiff's objections, that the Traders Insurance Company does not insure canning factories. In the absence of notice to Catlin of such practice we hold this evidence incompetent. It would, no doubt, be competent to prove a general custom among insurance companies to refuse such a risk, but not a private practice of a single company, of which the insured had no notice. Luce v. Dorchester Ins. Co., 105 Mass. 297; 2 May on Insurance, Sec. 582; 1 Wood on Insurance, Sec. 257.

The parties in this case made an agreed statement of facts which was read in evidence by plaintiff. It admitted the insurance, the loss by fire, the date of the loss; that the loss greatly exceeded all insurance; that no question was raised by defendant as to due notice of loss or proofs of loss; that if plaintiff was entitled to recover he was entitled to the full amount named in the policy, with interest, according to law. It stipulated everything necessary to make a *prima facie* case for the plaintiff, except that it did not state the amount of insurance by defendant, but for that expressly referred to the policy. Of course, none of the facts so agreed to could be disputed during the trial by either party. For example, after making this agreed statement of facts,

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defendant would not have been allowed to introduce evidence tending to show it did not issue the policy, or that the fire did not occur; that proofs of loss were not made as required by the policy; or that the loss was less than the amount of insurance. The production of the policy, to show the amount of insurance written by defendant on the barn, granary and machinery, made a case for plaintiff. At the trial no effort was made to contradict any of the stipulated facts making a *prima facie* case for plaintiff. The defense was wholly devoted to showing that plaintiff's tenant, after the insurance and without notice to the company, did certain things, some of them forbidden by the policy, the result of which was that the hazard was greater at the time of the fire than when the insurance was written. That was the only question tried. It is clear the burden rested upon defendant to establish that defense by a preponderance of the evidence, and unless it did so, plaintiff was entitled to a verdict. No instruction was given the jury advising them upon whom the burden of proof rested except No. 16, given at the request of defendant. It was as follows:

“ You are further instructed that the plaintiff must prove his case by a preponderance of the evidence, which means a greater weight of the evidence; and unless you believe that the greater weight of the evidence is in favor of the plaintiff, your verdict will be for the defendant.”

In an ordinary action, where plaintiff's *prima facie* case is contested and denied, such an instruction would be substantially correct. But in such a case as this, where defendant has admitted all the facts *prima facie*, entitling plaintiff to recover, and upon the only question litigated the defendant has the burden of proof, we think the instruction erroneous and calculated to mislead. It was not true in this case; plaintiff had to prove his case by a preponderance of the evidence, for defendant admitted his case, and under the agreed statement of facts could not be permitted to dispute it. The agreement made it necessary for defendant to establish an affirmative defense to overcome plaintiff's *prima facie* case. While the first part of the instruction referred in terms to plaintiff's case, the latter part would naturally be understood

by the jury as referring to the subject upon which conflicting testimony had been introduced, and it told them that unless the greater weight of the evidence was in favor of the plaintiff their verdict should be for the defendant. As applied to the only issue litigated it told the jury to find for defendant unless plaintiff had the greater weight of evidence; in other words, unless the greater weight of the evidence was the risk was not increased, they should find for defendant. A similar instruction was held misleading and erroneous where there was no serious controversy but that plaintiff had made a *prima facie* case in American Straw-board Co. v. C. & A. R. R. Co., 177 Ill. 513. The special finding does not show the error was harmless, for this instruction, as applied to the question litigated, was likely to be understood by the jury to mean that they should find the hazard increased unless plaintiff had shown by a preponderance of the evidence that it was not. We also think that in view of the question at issue, the special question put to the jury should not have called this "a frame hay and stock barn," for the reasons hereinafter stated.

Instruction No. 17, given at the request of defendant, was as follows:

" You are further instructed that if you believe from the evidence that at the time of the fire which destroyed the building, which had been insured as a frame hay and stock barn, said building was being used for any other purposes at the time of the fire which increased the hazard from that of a frame hay and stock barn, then your verdict must be for the defendant, even if such change or use has not been shown to have contributed to the destruction of said building."

The policy in suit described the property insured as follows:

" \$2,200 on frame dwelling house, with shingle roof, including plumbing and all permanent fixtures therein situate, attached and occupied by T. L. Miller as his family residence; \$320 on frame carriage house with shingle roof, situated about 140 feet from the above described dwelling; \$160 on frame granary with shingle roof, situated about 150 feet from the above described carriage house; \$160 on the

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boiler, engine, machinery, shafting and belting and connections, and \$2,600 on frame hay and stock barn with gravel roof, including basement and foundations, situate about 140 feet from the above described granary, all situate on stock farm. * * * Permission granted to make repairs and alterations."

This policy was but a renewal, in the name of Catlin, of a prior policy upon the property issued three years before when owned by Miller and wife. The defendant put in evidence the application for said prior insurance, and it described said farm buildings, boiler, engine, machinery, shafting, belting and connections in substantially the same language. The policy does not state in what part or parts of these several farm buildings said "boiler, engine, machinery, shafting and belting and connections" are located, but, it is obvious it contemplates they are in some or all of said described buildings. The oral evidence shows that at the time of said first application, and ever since, the boiler and engine were in the granary, the shafting extended about 144 feet in a box underground from the granary to and into the basement of the barn; the belting was attached to said shaft by pulleys thereon in the barn, and was used to conduct the power from said shaft to the machinery; and that there was in said barn machinery operated by power thus transmitted from the shafting. The policy does not in express terms say permission is given to operate said boiler, engine, shafting, machinery, belting and connections, but such permission is clearly implied. Farmers do not put such machinery in their farm buildings to remain idle, but for use, and the insurance company must have so understood, and must be held to have contracted that it should be operated. Before the canning machinery was put in there had been in that part of the barn where it was afterward placed, three machines, a hay cutter, a root grinder or pulper, and a cake crusher to break up oil cake. The proof is, this machinery was used to prepare the produce of the farm for feeding it to the cattle and for selling. The insurance company finds no fault with the operation of this machinery in the barn, and apparently could not

under the policy. In the briefs plaintiff calls these large machines, and defendant calls them small, and in some of defendant's hypothetical questions they were described as such machines as are ordinarily used in barns. Our attention is not called to any evidence which shows that any machinery operated by steam power is ordinarily used in a hay and stock barn, nor which shows the size of the machinery described in this policy, and which was in the barn when it was insured. We may fairly assume the machinery was sufficiently large and heavy, so that it was considered profitable to put in the steam engine, boiler and shafting to run it. We understand the agreed statement of facts to stipulate that the machinery, boiler, engine, etc., covered by the policy and destroyed by the fire, were worth not less than \$1,500. The policy did not describe the machinery in detail, nor restrict the amount or kind of machinery which might be operated in the barn by power from the shaft. It contemplated the operation of an indefinite amount of machinery for farm purposes. This was not insured as a mere hay and stock barn, but as such a barn with machinery in it operated by steam power, and with the right to so operate it for the use of the farm. The use of any canning machinery must necessarily increase the hazard over that which would exist in a mere hay and stock barn, yet it might be no more hazardous than such a barn with such machinery operated therein as this policy contemplated. This seventeenth instruction ignored the hazard arising from the machinery Miller had a right to operate in the barn under the terms of the policy, and told the jury their verdict must be for defendant if the hazard was increased from that of a hay and stock barn, and virtually directed a verdict for defendant. Instruction No. 20 given for defendant contained a like error, and left it to the jury to say whether the policy was issued upon a hay and stock barn. It ignored the provisions of the policy relating to machinery, and left the jury to construe the policy.

The judgment is reversed and the cause remanded for a new trial.

CASES
IN THE
APPELLATE COURTS OF ILLINOIS.

THIRD DISTRICT—NOVEMBER TERM, 1898.

Benjamin Behrman et al. v. Myer Livingston et al.

1. **Costs—Prosecuting as a Poor Person.**—Under Sections 4 and 5 of Chap. 33, R. S., entitled “Costs,” courts have a discretion to allow or deny a motion for leave to prosecute as a poor person, and its decision thereon will not be held error by a reviewing court unless the discretion is shown to have been abused.

Bill for Relief.—Trial in the Circuit Court of McLean County; the Hon. COLOSTIN D. MYERS, Judge, presiding. Bill dismissed; appeal by complainant. Heard in this court at the November term, 1898. Affirmed. Opinion filed June 3, 1899.

JAMES L. LOAR, attorney for plaintiff in error.

LIVINGSTON & BACH and **ALFRED SAMPLE**, attorneys for defendants in error.

MR. PRESIDING JUSTICE BURROUGHS delivered the opinion of the court.

The plaintiff in error filed in the Circuit Court of McLean County his bill of complaint in chancery to the February term, 1898, against the defendants in error, who are the heirs at law and personal representatives, respectively, of Aaron and Samuel Livingston, deceased. That court dismissed his bill without prejudice, and he prosecutes a writ of error from this court to reverse that decree.

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The bill charges that on and long before June 10, 1866, Abraham Behrman, Aaron Livingston and Samuel Livingston, as partners, doing business under the name of S. Livingston & Co., were engaged in the business of selling clothing and furnishing goods in the city of Bloomington, McLean county, Illinois; and the firm owned personal and real estate in that county of the value of \$78,000 (each of the partners having one-third interest therein), when on June 10, 1866, Abraham Behrman died intestate, leaving the plaintiff in error and some others, naming them, as his only heirs at law, to whom his interest in said property descended. That shortly after the death of Abraham Behrman, the two surviving partners, contriving and intending to cheat and defraud complainant out of his interest in the estate of Abraham Behrman, deceased, fraudulently procured Aaron Livingston to be appointed administrator of his estate, and wrongfully caused persons to be appointed to appraise the property thereof who were interested therein, and otherwise disqualified to act as such; and that they made no valid appraisal thereof, and neglected to certify an appraisal under oath as required by law.

That Aaron Livingston, as such administrator, failed to make any inventory of the property belonging to the estate of his intestate, and secretly and fraudulently, without any order of the court, and without public notice, sold the entire personal property belonging to the estate of said deceased (save and except the accounts owing to said firm), to his brother Samuel and himself for the sum of \$53,300, while he knew it was worth at least \$65,000; all being in pursuance of the design to cheat and defraud the heirs at law of Abraham out of their full share therein. That no accounting has been made to the plaintiff in error by said Aaron and Samuel Livingston, or any one for them, for his interest in the estate of Abraham Behrman, deceased, save and except to the extent of about \$1,500 of the cash on hand, and about \$1,000 on account of other personal property; but that Aaron and Samuel converted all of the share of the estate of Abraham in the property of said firm (except

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as above stated) to their own use; thereby making it a trust fund in their hands for the heirs at law of said Abraham, deceased. That Aaron Livingston died intestate in Bloomington, Illinois, on or about September 25, 1881; and Samuel Livingston died testate in the same city, about October 9, 1892. That all the foregoing fraudulent acts of Aaron and Samuel Livingston were well known to those who are made defendants to the bill, and who are averred to be all the personal representatives and heirs at law respectively of said Aaron and Samuel; and to have in their possession all the property of said firm, or its proceeds. The bill prays that the defendants be required to account to the complainant for such trust estate, and pay him his equitable share thereof; and also prays for general relief; and is sworn to by the complainant.

On the first day of the February term, 1898, the defendants moved the court to rule the complainant to give bond for costs; and supported their motion by affidavits to the effect that the claim made upon them by complainant in his bill was wholly without merit and would be dismissed for that reason on the hearing; that the complainant was unable to pay the costs that would be decreed against him, as he was wholly insolvent.

The court allowed the motion and entered a rule on the complainant to give bond for costs by a day mentioned, or to show cause within that time. Within the time allowed the complainant entered a motion to vacate the rule, and that he be permitted to prosecute his cause as a poor person; supporting it with the affidavits of himself and his solicitor, to the effect that complainant was unable to give a bond for costs, but they believed he had a good and meritorious claim, as set forth in his bill, and if the same was heard he would, in the opinion of both, recover a large sum of money from the defendants.

The defendants filed objections to allowing the complainant to prosecute as a poor person on the showing made, and moved the court to dismiss the bill, supporting their objections and motion with affidavits to the effect that

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shortly after the death of Abraham Behrman there was had regular administration upon his estate in the County Court of McLean county, in which all his personal effects were regularly accounted for and paid out under the direction of that court; and that all his real estate was sold in a regular partition proceeding in the Circuit Court of said county, and the proceeds thereof accounted for and paid over to the persons to whom it belonged, under the supervision and orders of that court; so that there is nothing to be accounted for to complainant from the estate of Abraham Behrman, deceased, whatever; and that the claim of complainant made in and by his bill is entirely without merit. These affidavits further state that complainant is now about fifty years old, and has lived in the State for the past thirty years, and that he was living in Bloomington and engaged there in the clothing business when the administrator of the estate of Abraham Behrman, deceased, made his final settlement of that estate in the said County Court; but that he then made no objection thereto, or did he ever make any claim or bring any suit on account of any claim he had to any unaccounted-for property of that estate until he filed this bill; and that Aaron Livingston died sixteen years before the bill was filed, and Samuel Livingston died five years before. These affidavits were supported by sworn copies of the files, orders and decrees of the courts, referred to in the affidavits, corroborating the statements made in the affidavits filed with the objections and motion.

The court, upon hearing complainant's motion for leave to prosecute as a poor person, and defendant's objections thereto and their motion to dismiss bill, denied complainant's motion, but gave him several additional days' time in which to comply with the rule to file a bond for costs. After the expiration of such additional time, there being no bond for costs filed, the court, for such failure, entered its decree dismissing the bill without prejudice.

The error assigned on this record is that the court improperly allowed the defendants to file the affidavits, and make the showing they did on their objections to complainant's motion for leave to prosecute as a poor person, and the

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plaintiff insists that the court ought to have permitted him to prosecute his bill as a poor person, and required the defendants to answer the same and heard the cause on its merits.

We think that by Secs. 4 and 5, Chap. 33 of the Costs Act, the court had a discretion to allow or deny the motion of the plaintiff in error for leave to prosecute his bill in *forma pauperis*, and its decision thereon ought not to be held to be error by a reviewing court unless that discretion is shown to have been abused. Clement v. Brown, 30 Ill. 43; Gesford v. Critzer, 2 Gilman, 698; and Selby v. Hutchinson, 4 Gilman, 319.

The facts set up by the bill show that complainant is seeking to enforce against the defendants an old and stale claim, and that, too, without averring any reason for such delay.

The showing made by the defendants in error in support of their objections to the allowance of complainants for leave to prosecute as a poor person, was properly heard and considered by the court that it might be aided in the proper exercise of its discretion.

From the showing made on the motion and the affidavits thereto, we do not think the court abused the discretion with which it was clothed when it denied complainant's motion for leave to prosecute in *forma pauperis*.

As the record shows that plaintiff in error failed to file a bond for costs within the time fixed by the rule, the court properly entered the decree dismissing the bill without prejudice, hence we affirm its decree. Decree affirmed.

City of Litchfield v. Mary Anglim.

1. NEGLIGENCE—*Traveling Upon a Sidewalk With Knowledge of Defects.*—Traveling upon a sidewalk, by one having knowledge of dangerous defects therein, does not necessarily constitute negligence.

2. JURY—*Province of, etc.*—It is the province of the jury, and not that of a witness, to say whether, in actions for personal injuries, the plaintiff was proceeding with care when the accident occurred.

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Action in Case, for personal injuries. Appeal from the City Court of the City of Litchfield, Montgomery County; the Hon. AMOS OLLER, Judge, presiding. Verdict and judgment for plaintiff; appeal by defendant. Heard in this court at the November term, 1898. Affirmed. Opinion filed June 8, 1899.

PAUL McWILLIAMS, attorney for appellant.

LANE & COOPER, attorneys for appellee.

MR. JUSTICE HARKER delivered the opinion of the court.

This is an appeal from a judgment of \$450, recovered by appellee for injuries sustained by her in falling into a hole in a defective sidewalk.

The evidence in the record shows that several months before appellee met her injury the city authorities had removed a board sidewalk, which had before existed on the west side of Warren street, in Litchfield, and in its stead constructed a cinder walk, leaving a few sections of the board walk to cover some drains, which passed under the walk, to drain adjacent lots. The wooden sections so left were old and in bad repair. At one place there was a plank out, six inches wide and four feet long, exposing a hole from twelve to eighteen inches in depth. While passing along the walk, on a dark and rainy night in February, 1898, appellee fell into this hole and sustained the injuries complained of.

That appellant was guilty of gross negligence in allowing such a man-trap, as the evidence shows this hole was, to exist for a period of six months, is not denied, but it is contended that appellee is precluded from a recovery by knowingly exposing herself to danger, and failing to exercise ordinary care for her own safety. Defending upon that line, appellant moved the court to instruct the jury to find the issues against appellee. The overruling of that motion is the chief contention relied upon for a reversal of the judgment. We do not think the trial court erred in overruling the motion. The place where appellee fell was shrouded in darkness, there being no street lights in that vicinity, and it was upon the line of travel from the house she had been visiting to her home. True, she knew of the

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hole in the walk, and had passed over it earlier during the same evening; but the mere fact of her attempting to pass over it again did not necessarily render her guilty of such contributory negligence as should preclude all right of recovery. That traveling upon a sidewalk by one having knowledge of dangerous defects therein does not necessarily constitute negligence, is abundantly supported by authority. (Beach on Contributory Negligence, 39; City of Aurora v. Dale, 90 Ill. 46; City of Bloomington v. Chamberlain, 104 Ill. 268; Village of Clayton v. Brooks, 150 Ill. 97; Evans v. City of Utica, 69 N. Y. 166; Bullock v. City of New York, 99 N. Y. 654; Whittaker v. West Boylston, 97 Mass. 273.) The knowledge which the party suing had of the dangerous condition of the sidewalk is a circumstance, and perhaps a strong one, tending to show want of ordinary care, but it is only a circumstance, to be submitted in connection with other facts and circumstances in proof, to enable the jury to determine the ultimate fact of whether the party was, at the time of receiving the injury, in the exercise of proper care for his own safety.

While appellee was on the witness stand her counsel, over the objection of appellant, was permitted to ask her the following question: "Were you going along carefully or otherwise?" She answered, "I was going along carefully." The question and answer were both improper. It was the province of the jury, and not that of the witness, to say whether she was proceeding with care. It appears from the record, however, that she and the witness in company with her, John Handrehan, detailed the facts attending the injury, stating fully the manner in which she was walking and what took place immediately before and at the time of the injury. We think the facts detailed by him justified the jury in the conclusion that appellee was at the time in the exercise of reasonable and ordinary care. The error of court, in allowing the question and answer, was not sufficiently harmful, therefore, to require a reversal.

The court gave nine instructions for appellant and refused one asked by it. The refused instruction related to the

care which the law requires of one passing over a dangerous sidewalk. The principle embodied in it was contained in instructions numbered 5, 7 and 9. There was no error in refusing it. The jury were fully instructed upon the law of the case.

We see no sufficient ground for disturbing the judgment, and the same will be affirmed.

First National Bank v. W. Y. Sanford.

1. **APPEALS**—*Lie from the County Courts to Appellate Court in Applications for Release from Imprisonment.*—Appeals from the County Court in applications under the provisions of Chapter 72, R. S., to be released from the imprisonment imposed by a writ of *capias ad satisfaciendum* lie to the Appellate Court.

2. **EXECUTIONS**—*Against the Body as Part of a Proceeding at Law.*—The issuance of an execution against the body forms part of a proceeding at law, within the meaning of the legislative intent, in the use of that expression.

3. **EVIDENCE**—*Hearsay, Incompetent.*—In a proceeding to discharge a debtor from imprisonment, for refusing to surrender his estate upon the question of justifying payments of money to his wife, as money due her for her earnings as a boarding-house keeper, and for the care of his children by a former wife, testimony of an accounting had between himself and wife, by which it was ascertained there was a balance of about \$2,100 due her, is incompetent.

4. **MEASURE OF PROOF**—*Where Fraud is Charged.*—In a proceeding in the County Court under the provision of Ch. 72, R. S., where the defendant is charged with having been guilty of fraud in refusing to surrender his estate on execution, it is sufficient to sustain such charge by a preponderance of the evidence.

Application for Discharge from Imprisonment.—Appeal from the County Court of Sangamon County; the Hon. CHARLES P. KANE, Judge, presiding. Heard in this court at the November term, 1898. Reversed and remanded. Opinion filed June 3, 1899.

ROBERT E. HAMILL and JAMES H. MATHENY, attorneys for appellant.

JAMES E. DOWLING and ROBERT H. PATTON, attorneys for appellee.

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MR. JUSTICE WRIGHT delivered the opinion of the court.

An execution against the body of appellee having been issued upon a judgment in favor of appellant, in the Circuit Court, for his alleged unjust refusal to surrender his estate for the payment of such judgment, and that since the debt for which judgment was rendered was contracted, he had fraudulently conveyed, concealed or otherwise disposed of some part of his estate, with a design to secure the same to his own use and defraud his creditors, the appellee applied to the County Court, under the provisions of Chapter 72, Revised Statutes, to be released from the imprisonment imposed by such writ. The question whether appellee was guilty of the fraud charged, and of his refusal to surrender his estate was tried by a jury and a verdict of not guilty returned, and after overruling appellant's motion for a new trial, the court gave judgment upon the verdict, discharging appellee from such imprisonment, and against appellant for costs, from which the latter has appealed to this court.

Appellee has moved this court to dismiss the appeal because, as counsel argue, the appeal should have been taken to the Circuit Court. If it shall be determined that a proceeding like this is a suit or proceeding at law or in chancery, within the meaning of section 8 of the Appellate Court act, then the appeal to this court was proper. Execution-against the body, or *capias ad satisfaciendum*, as the process was usually called, is of ancient jurisdiction in the courts of common law, and while the issuance of such a writ may not be regarded as a suit at law, it can not well be doubted the process forms a part of a proceeding at law within the meaning of the legislative intent in the use of that expression. Blackstone defines proceeding to be the course of procedure in the prosecution of an action at law, and procedure is defined by Webster as the act or manner of proceeding or moving forward, progress, process, operation, conduct, a step taken, an act performed, a proceeding, the steps taken in an action or other legal proceeding. Therefore the commencement of the proceeding in question was a step taken in an action in a common law court, and process issued out of a suit at

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law. It is true that the legislature has provided the remedy by which a defendant in such a proceeding may be discharged from the effect of such process, shall be administered by another jurisdiction, namely, the County Court, but the issue to be tried arises out of and upon the record of the court in which the judgment at law remains. If the statute creating the remedy directed the issue to be tried in the same case and court from which the process might be issued, it could not be well maintained such trial was not a proceeding at law. Does, then, the transfer of the jurisdiction to another court merely change the character of the proceeding and deprive it of its common law origin and nature? We think it unreasonable to so conclude. And this conclusion is not without authority for its support.

The case of Hunting v. Metzger, 158 Ill. 272, was a case like the one we are considering. The appeal was taken to the Appellate Court and from thence to the Supreme Court, and while in the report of the case nothing appears to have been said expressly upon the point here in question, still the history and record of the case show the point was before the court, and the remanding order of the Supreme Court, with its directions to the Appellate Court to enter such judgment, reversing or affirming the judgment of the County Court, as in their judgment might be proper, was in legal effect to sustain the jurisdiction of the appeal in the Appellate Court. The motion to dismiss the appeal herein will therefore be denied.

The errors chiefly urged upon our attention by counsel for appellant, for which a reversal of the judgment is sought, are that the court admitted improper evidence and gave improper instructions to the jury. In the view we have of the case it will not be necessary to refer to or discuss all of the various and numerous points made in the argument. It appears from the evidence that in March, 1893, appellee purchased a stock of furniture worth \$6,800, of which he paid \$4,000 and borrowed from appellant \$1,100, which was also used in such purchase. Upon written statements and representations made by appellee of his financial

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standing and ability, in none of which was any reference made to any indebtedness due to his wife, the loan to him by appellant was renewed from time to time, until in January, 1897, when he sold to Griswold for \$2,000 in cash, which he received. At the same time appellee drew from his bank account \$128, which with the \$2,000 received from Griswold he paid to his wife, less some minor amounts paid to others, as he claims. Appellant caused judgment to be taken upon its note, execution issued and demand was made upon appellee for payment or the surrender of his estate, and he failing in those respects, application was made to the judge of the Circuit Court for an execution against the body, which, having been ordered and issued, resulted in these proceedings. Upon the trial, to justify the payment of the money to his wife, appellee claimed she had at various times loaned him money earned by her as a boarding housekeeper, and that compensation was due her for the care of his children by a former wife. To sustain this claim the court, against the objection of appellant, permitted appellee and Mrs. Summerville to testify to an accounting had between himself and wife, by which it was ascertained there was a balance of about \$2,100 due to Mrs. Sanford from appellee. The admission of this testimony violated the elementary rules governing the production of evidence. It proved nothing but the statements and admissions of Sanford and wife, which in that form was hearsay merely. While it is true the court ruled that Mrs. Summerville should testify to items of her own personal knowledge, yet it is plain from the evidence that a large part of the items computed by her to compose the \$2,100, she had no knowledge of except the statement of Sanford and wife, and as to such matters she was clearly not qualified to testify. This infirmity was patent also by the nature of the questions asked, and the objections to them should have been sustained. The evidence upon this point was vital to the issue being tried, and it was prejudicial error to admit it.

In its instructions to the jury, at the request of appellee and of its own motion, by instructions requested by appell-

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lant as modified, the court instructed the jury that unless they believed from all the evidence in the case, beyond a reasonable doubt, that appellee fraudulently conveyed or transferred his money or property to his wife for the purpose of securing the same to his own use, or of defrauding the First National Bank, then as to such conveyance or transfer of money or property to his wife the jury will find the defendant not guilty. We are asked to sustain these instructions under the authority of Crandall v. Dawson, 1 Gilm. 558; McConnell v. Delaware Ins. Co. 18 Ill. 229; Darling v. Banks, 14 Ill. 46; Crotty v. Morrissey, 40 Ill. 480; Harbison v. Shook, 41 Ill. 146; Corbley v. Wilson, 71 Ill. 213, and Germania Fire Ins. Co. v. Klewer, 129 Ill. 612. The result of these cases is to evolve the rule in civil cases that where the pleading charges the commission of a crime the party who makes such charge assumes the same strictness of proof as would be required to sustain a prosecution. It is conceded in Ins. Co. v. Klewer, *supra*, that the rule for which contention is made is one upon which the authorities are not in harmony. It seems to us that a rule requiring any greater degree of evidence than a mere preponderance upon any issue in a civil case, where only the private interests of the parties are in dispute, is exceptional and extreme, and we are not disposed to extend the rule further than we shall be compelled to under the decisions to which we have referred. In all the cases where the rule has been applied some infamous crime has been charged, such as perjury, larceny, arson and the like. In the case presented the evidence tends to prove only that appellee paid money to his wife with a design to secure the same to his own use and defraud his creditors. It may be well doubted, admitting the truth of the matter, if such act would be a violation of Section 122, Division 1, of the Criminal Code, or that it partakes of a criminal nature and it will not be contended the act would be attended with infamy according to the legal understanding of the word, or that it was felonious in any respect. If it is proper to apply the rule of reasonable doubt to the issue tried in this case, it would

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follow that it should also be applied in all cases in chancery or at law where the question of a fraudulent disposition of property was in issue. No case has been cited to us where such an issue was made and the rule of reasonable doubt applied to it. We are unwilling to consent to applying such rule of the law in such cases unless compelled by authority. The case presented is a civil suit, devoid of a charge of infamous crime, and in our opinion appellant was required to establish the material issues in the case by a preponderance of the evidence only, and it was error to instruct the jury that any particular issue should be proved beyond a reasonable doubt.

For the errors indicated, the judgment of the County Court will be reversed and the cause remanded.

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Douglas Reddish v. The People.

1. APPEALS—*In Criminal Cases.*—An appeal does not lie in a criminal case.

Indictment, for carrying concealed weapons. Trial in the County Court of Jersey County; the Hon. A. M. SLATEN, Judge, presiding. Verdict of guilty; appeal by defendant. Heard in this court at the November term, 1898. Dismissed. Opinion filed June 1, 1899.

Thos. F. FERNS, attorney for appellant.

MARTIN J. DOLAN, State's attorney of Jersey county, for appellee.

PER CURIAM.

This is an appeal by appellant from a judgment of conviction under an indictment for carrying a concealed weapon, imposing a fine of \$25. The State's attorney has moved the court to dismiss the appeal for want of jurisdiction, the reason assigned for such motion being that appellant has called in question here the validity of the statute under

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which the conviction was obtained. We do not deem it necessary to decide or discuss the question sought to be raised by the motion, for the reason, as we think, there is another and clear reason for dismissing the appeal, which is that an appeal does not lie in a criminal case. (Ferrias v. People, 71 Ill. App. 559, and cases cited; Hertel v. People, 74 Ill. App. 304.) For the reason therefore that an appeal does not lie in a criminal case, the motion to dismiss the appeal herein will be sustained, and the appeal dismissed.

**Cleveland, C., C. & St. L. Ry. Co. and The Peoria & E. Ry.
Co. v. Samuel T. Oliver, Adm'r.**

1. **ORDINARY CARE—*Use of, May Be Presumed.***—In actions to recover damages claimed to result from the death of a person in a railroad collision, a jury is authorized in finding that the deceased used ordinary care to avoid the collision, because of the presumption arising from the natural instinct of self-preservation.

Action in Case.—Death from negligence. Trial in the Circuit Court of McLean County; the Hon. COLOSTIN D. MYERS, Judge, presiding. Verdict and judgment for plaintiff; appeal by defendant. Heard in this court at the November term, 1893. Affirmed. Opinion filed June 8, 1899.

JOHN T. DYE and A. E. DEMANGE, attorneys for appellants.

FIFER & BARRY and AYERS, RINAKER & AYERS, attorneys for appellee.

MR. PRESIDING JUSTICE BURROUGHS delivered the opinion of the court.

This was an action on the case by the appellee against the appellants to recover damages for negligently killing Holmes W. Oliver on a public road crossing in the town of Danvers, in McLean county, Illinois. The case was tried by jury in the Circuit Court of that county, where the

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appellee recovered a judgment for \$1,000. The appellants bring the case to this court by appeal and assign numerous errors on the record, but urge as the principal grounds of reversing the judgment that the verdict is contrary to the law and the evidence, and that the court gave improper and refused proper instructions.

The declaration averred that the Cleveland, Cincinnati, Chicago & St. Louis Railway Co. is operating a railroad from Danville, Ill., to Peoria, Ill., that is owned by the Peoria & Eastern Railway Co.; and which passes at grade over a public road in the township of Danvers, in McLean county, Illinois; that on August 17, 1897, the Cleveland, Cincinnati, Chicago & St. Louis Railway Co. ran a certain locomotive engine and train of passenger cars upon and along the said railroad up to and across said public road at a great rate of speed, to wit, sixty miles an hour, without ringing a bell or blowing a whistle continuously for the distance of eighty rods before crossing the public road, as required by statute; nor did the defendants, or either of them, place and maintain at said road crossing, a sign board with the words "Railroad Crossing," or "Look out for the Cars," thereon as required by law; and that on said day in August, 1897, when the plaintiff's intestate was then and there in a wagon drawn by a team of horses, in and upon said highway crossing, and while he was in the exercise of ordinary care for his safety, he was, through the carelessness and negligence of the servants of the defendants in charge of said locomotive, struck by the locomotive attached to the train of cars aforesaid and killed. That he was eighteen years old when killed, and left a father, mother, sister and brother as his next of kin.

The defendants both interposed a plea of not guilty. The evidence shows that the defendants were the owner and operator respectively of the railroad at the time and place mentioned in the declaration; that the deceased was eighteen years old when killed; that he left the persons named in the declaration as his next of kin; that on August 17, 1897, the deceased was hauling wheat in a farm wagon

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drawn by two horses, from a threshing machine on the south side of the said railroad in the township of Danvers, McLean county, Illinois, to the village of Danvers in that township; and that in passing from the threshing machine to the village, he had to cross the railroad at a grade crossing over a public road, running north and south, which crossed it at about right angles. At this place the railroad ran about east and west, and the public road north and south; and to the east of the public road, for some distance before reaching the same, the railroad was in a cut through a raise in the land; the dirt taken out of the cut having been thrown on each side thereof, formed a bank there, upon which there was growing, at the time in question, horse weeds of considerable height; and at this time to the east of the public road, and north of the railroad, there was a field of growing corn in which the stalks were six or eight feet high, so that a person riding in a wagon approaching the crossing, could with difficulty, if at all, see a train on the railroad coming from the east until he and it were nearly onto the crossing. On the day he was killed, the deceased had taken his first load of wheat from the threshing machine to the village of Danvers, and was returning in the wagon along the public road, heretofore described, to the thresher, when the locomotive drawing a passenger train of the Cleveland, Cincinnati, Chicago & St. Louis Railroad Company, coming from the east at forty or fifty miles an hour, struck him with a force sufficient to kill him and throw his body 131 feet. A short time before he was struck, he was seen by several persons sitting on the wagon, looking south and driving his team on the road toward the crossing in a slow trot.

The engineer in charge of the locomotive, seeing the wagon and team when they were about to cross the tracks, sounded the whistle sharply, but it was too late then to stop the train or for the deceased to get off the crossing in time to avoid being hit. The evidence shows that the deceased was industrious, sober and possessed of all his faculties. There were no sign boards at the road crossing whatever;

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and there was a sharp conflict in the evidence as to whether or not the bell was kept ringing on the locomotive continuously for the distance of eighty rods before reaching the road crossing. The usual crossing whistle was sounded for the crossing in question and for two other crossings not far east of this one, but the whistle was not kept blowing for the distance of eighty rods before reaching the crossing where the deceased was killed.

The contention of the appellants' counsel is, first, that the declaration averred the deceased, when struck, was using due and ordinary care for his safety, which the plea denied; and he contends there was no proof that the deceased took any precautions to avoid the collision before going upon the crossing; hence the verdict is unsupported by any evidence on this material averment; second, the court by its third instruction, given at the instance of the plaintiff, told the jury "if they believed from the evidence the plaintiff's intestate, at the time in question, used such care for his own safety as a reasonably prudent person of like age, capacity and experience would have used under the same or like circumstances, then you are instructed, that if you further believe, from the evidence, that while he was in the exercise of such care, he was killed through the carelessness and negligence of the defendants, as charged in some count of the declaration, then your verdict should be for the plaintiff," which was erroneous, as there was no evidence in the record to the effect that the deceased was using ordinary care for his safety when killed, hence the instruction had no evidence to support it on that point; and, third, the court improperly refused to give the defendants' fourth instruction, which is as follows: "In an action like this, to recover damages claimed to result from the death of a person in a railroad collision, the question of whether the person who met his death exercised care for his own safety, such as an ordinary careful and prudent person would have used, familiar with the crossing and knowing its danger, if any, is a material question, and such care must be proved by the plaintiff by witnesses who saw

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the deceased, or by other facts and circumstances given in evidence, otherwise the plaintiff can not recover," which was prejudicial error, as the points covered by it were not included in any other given instruction.

As to the first and second contention, above stated, we will say that there appears in this record no conflict in the evidence, but that the deceased was a youth of sober and industrious habits, of fair intelligence, and with all his senses unimpaired; that he approached the crossing in question from the north, sitting on the seat in the wagon, his face fronting in the direction his team was going; that he drove in a slow trot, and he was seen looking toward the crossing just before he went upon it. That for some considerable distance, before he reached the crossing, his view of the train, approaching it from the east, was almost, if not entirely, obscured by a field of growing corn, elevated ground, dirt embankment with horse weeds growing thereon, all laying between him and the train, until he was very close to the track; and the evidence fails to show that any eye witness who testified, saw all the precautions taken by the deceased to avoid being struck by the train; but the eye witnesses who did see him when he approached the crossing, and testified to what he did, do not pretend to say that they saw all that he did when approaching the crossing; so that in the absence of other countervailing evidence, the jury were authorized in finding that the deceased did use ordinary care to avoid the collision, because of the presumption arising from the natural instinct of self-preservation. See Dallemand v. Saalfeldt, 175 Ill. 310; Baltimore & Ohio S. W. R. R. Co. v. Then, Adm'r, 159 Ill. 535; and Illinois Central R. R. Co. v. Nowicki, 148 Ill. 29.

So there was evidence both direct and indirect, tending to show due and ordinary care on the part of the deceased, for his own safety and the court, for that reason, properly gave plaintiff's third given instruction.

As to the third contention above stated, that is completely answered against appellants by the record showing that

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the court gave the defendants' seventh instruction, which is as follows:

"The burden is upon the plaintiff to prove by a preponderance of the evidence, that the deceased, H. W. Oliver, just before and at the time of the accident, was using such care and caution for his own safety as an ordinarily prudent and careful person with the knowledge of the place which you may believe the evidence shows he had, would use to keep himself out of danger, and if the plaintiff has failed to prove that the deceased was at that time using such care, plaintiff can not recover, and you should in that case find the defendant not guilty;" which covers all the salient points embraced in appellants' fourth refused instruction; so it was not error to refuse it for that reason. See Whitney & Starrette Co. v. O'Rourke, 172 Ill. 177, and Standard Brewery v. Nudelman, Ib. 337.

As to whether or not the statutory signals were given by the servants of the appellant in charge of the locomotive that killed appellee's intestate, the evidence was very conflicting on that question, and being one of fact, we ought not to invade the province of the jury and disturb their verdict on that question, as being against the weight of the evidence when there is enough evidence in favor of the verdict, which, if uncontroverted, would justify it, and especially since it comes to us sanctioned by the presiding judge, unless the record disclosed some evidence of prejudicial rulings of the trial judge on the evidence or the instructions which may have improperly influenced a verdict against the appellant, none of which appear in this record. Hence we affirm the judgment appealed from.

Judgment affirmed.

**Frank Lindley, Assignee of C. H. Beckwith, and Cook,
Bell & Black v. A. R. Orr, Assignee of
W. B. Cauble, Insolvent, et al.**

1. **INSURANCE—Who Entitled to the Proceeds.**—No person except the assured, or his assignee, can rightfully claim the proceeds of a policy of insurance by reason of having a lien against the insured property unless by agreement, or unless the insurance was effected in whole or in part for his benefit.

2. **SAME—Policies Are Personal Contracts.**—Policies of insurance against loss by fire are personal contracts with the assured and do not attach to the property insured, or in any manner go with the same as an incident to a conveyance or transfer of the title, or the creation of a lien thereon, without express agreement or manifest intention on the part of the assured that the insurance was effected for the benefit of such person interested in the property.

3. **SAME—Property May be Insured for the Protection of Third Persons.**—By an agreement to insure for the protection and indemnity of another person, having an interest in the subject of the insurance, the assured may give such person an equitable lien upon the money due upon the policy to the extent of such interest.

4. **SAME—Rights of Lien Holders.**—A mere lien upon the property insured does not give the holder of the lien a claim upon the policy which the owner of the goods has obtained for the protection of his own interest therein; although the insured is personally liable to pay the debt and which is a lien upon the property insured.

5. **SAME—Right of Mortgagees.**—A mortgagee has no right to claim the benefit of a policy underwritten for the benefit of the mortgagor on the mortgaged property in case of a loss by fire. The contract is strictly a personal contract for the benefit of the mortgagor, to which the mortgagee has no more title than any other creditor.

6. **SAME—Right of Intervention.**—A mortgagor can not recover insurance money from a mortgagee except under such circumstances; nor a mortgagee from a mortgagor; nor a debtor from a creditor. In order to give the right to intervene between the insurer and insured, the party intervening must have some relation to, or concern with, the contract of insurance.

7. **SAME—Rights of Execution Creditors.**—A creditor who acquires title to an estate under a levy of execution has no relation to, or concern with, a contract of insurance between the former owner of the estate and the insurers, upon which to found a claim upon the realty for the amount of the loss or any part of it.

8. **SAME—A Personal Contract.**—The contract of insurance is a personal contract and does not run with the title to the property, or with

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the subject-matter of insurance, unless by special stipulations wholly foreign to itself, either interpolated in the contract or in addition thereto.

9. **SAME—Satisfaction—To Whom to be Made.**—Satisfaction is to be made to the person insured for the loss he may have sustained.

Voluntary Assignments.—Appeal from the County Court of Vermilion County; the Hon. M. W. THOMPSON, Judge, presiding. Heard in this court at the November term, 1898. Affirmed. Opinion filed June 8, 1899.

PENWELL & LINDLEY, attorneys for appellants.

O. A. McFARLAND, attorney for Wadsworth-Howland Company; H. M. STEELY, attorney for A. R. Orr (assignee), appellees.

MR. JUSTICE WRIGHT delivered the opinion of the court. Appellants obtained judgments and executions against W. B. Cauble, which were valid liens against his real and personal estate, and pending the same and before a levy of the executions had been made, Cauble made assignment of all his property to appellee Orr for the benefit of creditors, under the provisions of the act concerning voluntary assignments. Previous to the assignment the insolvent had insured the property, taken the policies payable to himself, with no mention or reference therein to any creditors or class of creditors, with the exception that one of the policies contained the clause that the loss should be payable to the building association as its interest might appear, it being a mortgagee. After the assignment all the property covered by the insurance, except a drug store located at the postoffice in the village of Sidell, was destroyed by fire. The premiums on some of the policies not having been paid by the insolvent, were paid by appellee from funds in his hands as assignee. After paying the mortgage of the building association, \$3,341.68 of the proceeds of the insurance policies remained in the hands of the assignee for distribution, as well also as \$216, the net proceeds of sale of the postoffice drug store, and it may be other assets of doubtful value, not necessary to be mentioned here as affecting the decision of the case.

In the County Court appellants, as judgment and execution creditors of the insolvent, claimed a priority and lien under their several judgments and executions upon the proceeds of the insurance policies in the hands of the assignee, but the court by its order denied such claim for priority, and relegated appellants to the position of general class creditors in respect to such fund, except to \$216, the proceeds of the sale of the undestroyed drug store, from which order appellants prosecute this appeal, and renew their insistence in this court that the proceeds of the insurance policies in the hands of the assignee stands in the place of the property upon which their liens existed and that by operation of law, and especially as a principle of equity jurisprudence, their liens and claims for priority are extended to the fund, with the same force that existed against the property itself. There is no claim that the insurance was effected by the request of appellants or any of them, or that the insolvent or his assignee had agreed to insure, or that it was specially intended for the benefit of appellants. The question arising for decision, therefore, is whether any person except the assured or his assignee, after loss, can rightfully claim from the party to whom the loss has been paid, the proceeds of the policy or any part thereof, by reason of having a lien against the property itself merely, unless by agreement, or unless the policy was intended or the insurance was effected in whole or in part for his benefit.

Counsel for appellants have cited numerous cases in the Supreme Court of this State which they contend support their position. We do not find that the point in question here arose for decision in any of the cases to which we have been referred, and so far as we know it has not been decided by the court of last resort in this State. Amongst other jurisdictions the authorities are not in entire harmony upon it, but upon examination we are of the opinion both the weight of authority and the better reasoning is against the contention of appellants, and that the true rule is that policies of insurance against loss by fire are personal contracts

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with the assured, which do not attach to the property insured, or in any manner go with the same as an incident to a conveyance or transfer of the title, or the creation of a lien thereon, without express agreement or manifest intention on the part of the assured that the insurance was effected for the benefit of such person interested in the property.

In some of the adjudged cases, notably in this State, the benefit of the insurance has been conferred upon persons regardless of the restrictions we have specified, but the right in such cases grew out of the equitable doctrine of rescission and restoration, by which the chancellor may adopt the most ready means discernible to renew the *status quo* of the parties, and is wholly inapplicable to the case under consideration. In Carter v. Rockett et al., 8 Paige (Ch.), 437, it was said :

“A contract of insurance against fire, as a general rule, is a mere personal contract between the assured and the underwriter to indemnify the former against the loss he may sustain. But the assured, by an agreement to insure for the protection and indemnity of another person having an interest in the subject of the insurance, may unquestionably give such third person an equitable lien upon the money due upon the policy to the extent of such interest. But a mere lien upon the property insured does not give the holder of that lien a corresponding claim upon the policy which the owner of the goods has obtained for the protection of his own interest therein; although the assured is personally liable to pay the debt which is a lien upon the property insured. (Neale v. Reid, 3 Dowl. & Ryl. 158; Beaumont on Fire and Life Ins., 77.) Here the defendant Rockett is personally liable for the payment of \$5,000 on one of the mortgages upon the premises; but as there was no agreement, either express or implied, that he would cause the premises to be insured for the protection of the rights of the complainant, or of his mortgagee, they have no better claim than any other creditors of Rockett to the fund which is due to him from the insurance company.”

In C. I. Co. v. Lawrence, 10 Pet. (U. S.) 507, it was said by Justice Story, delivering the opinion of the court:

“We know of no principle of law or equity by which a

mortgagee has a right to claim the benefit of a policy underwritten for the mortgagor on the mortgaged property in case of a loss by fire. It is not attached or an incident to his mortgage. It is strictly a personal contract for the benefit of the mortgagor, to which the mortgagee has no more title than any other creditor. Lord Chancellor King, in *Lynch v. Dalzell* (3 Bri. Parl. Cases, 497; 2 Marshall on Insurance, book 4, ch. 4, p. 803), took notice of this distinction, saying, 'these policies are not insurances of the specific things (goods) mentioned to be insured, nor do such insurances attach to the realty, or in any manner go with the same as incident, by any conveyance or assignment; but they are only special agreements with the persons insured against such loss or damage as they may sustain.' See also *Carpenter v. P. W. Ins. Co.*, 16 Pet. (U. S.) 495.

In *2 May on Insurance* (3d Ed.), Sec. 456, p. 1040, the author says:

"Indeed it may be stated, as a general rule, that no one, except the nominal assured, or his assignee, after loss, can claim either from insurers or from the party to whom the loss has been paid, any part of the proceeds of a policy unless by express agreement, or unless the policy covered property in which the claimant had an interest, and was intended and was effected in part, or in whole, for his benefit and at his expense. (*Steele v. Franklin Ins. Co.*, 17 Pa. St. 290; *Turner v. Stetts*, 28 Ala. 420; *Galyon & Co. v. Ketchen*, 85 Tenn. 55.) Thus a mortgagor can not recover from a mortgagee except under such circumstances; nor a mortgagee from a mortgagor; nor a debtor from a creditor. In order to give the right to intervene between the insurer and the insured the party intervening must have some relation to, or concern with, the contract of insurance. * * * A creditor who acquires title to an estate under a levy of execution * * * has no relation to, or concern with, a contract of insurance between the former owner of the estate and the insurers upon which to found a claim upon the realty for the amount of the loss or any part of it."

In Sec. 6, *1 May* (3d Ed.), p. 7, the author says:

"It is also a personal contract and does not run with the title to the property (*Quarles v. Clayton*, 87 Tenn. 308); whether the subject-matter of insurance be a ship or a building or a life, or whatever else it may be, although in popular language it may be called an insurance upon the

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ship or building or life, or some other thing, yet it is strictly an agreement with some person interested in the preservation of the subject matter to pay him a sum which shall amount to an indemnity, or a certain sum agreed upon as an indemnity. * * * It is a mere special agreement with a party seeking to secure himself against apprehended loss on account of his interest in a particular subject matter, and not at all incidental to or transferable with the subject-matter. (Carpenter v. Providence Wash. Ins. Co., 16 Pet. U. S. 495.) The contract of insurance does not run with the subject-matter of insurance, unless by special stipulations wholly foreign to itself, either interpolated in the contract or in addition thereto. Satisfaction is to be made to the person insured for the loss he may have sustained; for it can not properly be called insuring the thing, since there is no possibility of doing it, and therefore must mean insuring the person from damage."

Neither the assured nor his assignee having agreed or disclosed any purpose or intention to insure the property for the benefit of appellants, they have no better claim to the proceeds of the policies than any other creditors of the insolvent, and the order of the County Court was therefore right, and it will be affirmed.

**William H. Dooley v. August Meisenbach, J. B. Cessna,
George E. Brown, E. S. Brown and James Small.**

1. MALICIOUS PROSECUTION—*Where There is no Arrest or Seizure of Property.*—In an action for malicious prosecution, where the evidence fails to show that the plaintiff was arrested, or any of his property seized in the prosecutions complained of, and if it does not appear that he suffered any special damages on account of such prosecutions, beyond the expense and trouble attendant upon defending them, he can not recover.

Malicious Prosecution.—Trial in the Circuit Court of McLean County; the Hon. COLOSTIN D. MYERS, Judge, presiding. Verdict and judgment for defendant, by direction of the court; appeal by plaintiff. Heard in this court at the November term, 1898. Affirmed. Opinion filed June 3, 1899.

HENRY S. DOOLEY, and A. E. DEMANGE, attorneys for appellants, contended that a suit for malicious prosecution of a civil action may be maintained, though no process other than a summons was issued therein, and cited Am. & Eng. Enc. of Law, Vol. 14, p. 84, and note 1; Eastin v. Bank, 66 Cal. 123; Payne v. Donegan, 9 Ill. App. 566.

TRAINOR & BROWNE, attorneys for appellees.

The current of authority in this State is against the maintenance of actions such as this. The Appellate Court say:

"We are not prepared to hold that a defendant, in every civil suit, where there was no arrest of his person or attachment of his goods, may, upon the suit being decided in his favor, turn around and upon the mere allegation that the suit was brought maliciously and without any reasonable and probable cause, maintain an action on the case against the plaintiff as for malicious prosecution. The drift of the opinion of the court in Gorton v. Brown, 27 Ill. 489, although much that is said is mere *obiter dictum*, and that not from a very comprehensive view of the authorities, is manifestly against such actions being maintainable, except upon the ground of some special grievance." Paynes v. Donegan, 9 Ill. App. 569.

There is no special grievance shown in case at bar. Payment of attorney fees, court costs and more or less injury to credit, are things incident to each and every suit at law. Potts v. Imlay, 4 N. J. L. (1 South.) 330.

Also the weight of the decisions in this country and elsewhere is against the maintenance of this sort of suit. Eastin v. Bank of Stockton, 66 Cal. 123; Potts v. Imlay, 4 N. J. L. (1 South.) 330; Bitz v. Meyer, 11 Vroom (N. J.), 252; Woodmanse v. Logan, 2 N. J. L. 67.

Mr. Presiding Justice Burroughs delivered the opinion of the court.

This was an action on the case in which the appellant sued the appellees in the Circuit Court of McLean County to recover damages for malicious prosecution without probable cause. The case was tried by jury and the appellees recovered a verdict and judgment. The appellant brings

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the case by appeal to this court and insists upon our reversing the judgment on the ground that the Circuit Court improperly directed the jury to return a verdict for the appellees that is contrary to the law and evidence. The declaration charges that the appellees maliciously and without probable cause, prosecuted two civil suits in the Circuit Court of McLean County, Illinois, against the appellant, in both of which he defeated them and obtained a judgment against them for costs; and that the appellant was put to great expense and attorneys fees in defending the suits for which he claims damages. The appellees interposed pleas of not guilty, upon which issue was joined.

When all the evidence was in, on their motion, the court directed the jury to return a verdict for the appellees. And in this it committed no error, because the declaration and evidence both failed to show that the appellant was arrested or any of his property seized in the suits in question; nor did they disclose that the appellant had suffered any special damages on account of those suits, beyond the expense and trouble attendant upon defending them; so that he was not entitled to recover a verdict or judgment on the pleadings and evidence, as is expressly held in *Smith v. Michigan Buggy Co.*, 175 Ill. 619.

Judgment affirmed.

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Thomas Pearce v. Edward Pearce, Adm'r, etc.

1. **ESTOPPEL—By Tenant to Deny that He Owes Rent.**—A tenant who is permitted to cultivate the leased premises for the term is estopped to say that his landlord had no such title to the premises as gave him authority to rent them when sued by the administrator of the landlord's estate for the rent.

2. **RENTS—Recovery in an Action of Assumpsit.**—Where a tenant, occupying premises under lease providing for the delivery of one-third of the grain raised as rent, converts to his own use all the crops grown thereon during the term, such rents or their value may be recovered in an action of assumpsit under the common counts.

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Assumpsit.—Common counts. Trial in the Circuit Court of Clark County; the Hon. HENRY VAN SELLER, Judge, presiding. Verdict and judgment for plaintiff; appeal by defendant. Heard in this court at the November term, 1898. Affirmed. Opinion filed June 3, 1899.

GOLDEN, SCHOLFIELD & BOOTH, attorneys for appellant.

GRAHAM & TIBBS, attorneys for appellee.

MR. PRESIDING JUSTICE BURROUGHS delivered the opinion of the court.

This was an action of assumpsit tried by jury in the Circuit Court of Clark County, in which the appellee, as administrator of the estate of Mahala Pearce, deceased, recovered a verdict and judgment against the appellant for \$2,000. The appellant brings the case to this court by appeal and urges us to reverse the judgment on the grounds (1) that the trial judge made improper remarks during the trial of the case; (2) that the court admitted incompetent evidence for the plaintiff; (3) that the court denied defendant's motion to instruct the jury to find for the defendant on the question of rent; (4) that the court gave improper instructions for the plaintiff; and (5) that the verdict is contrary to the law and evidence and the damages assessed excessive. The declaration contained the common counts only, a bill of particulars being furnished on motion, in which the plaintiff claimed that the defendant was indebted to his intestate for rent of farm, from April, 1888, to April 4, 1897, at \$270 per year, \$2,430; for money borrowed from her at different dates during the same time, \$1,445.60; and for money left by his decedent when she died, \$500. The pleas were non-assumpsit, five years statute of limitations, tender and former adjudication. Issue was joined on the plea of non-assumpsit, a new promise to pay within five years was the reply to the plea of statute of limitations, and the pleas of tender and former adjudication were traversed.

The evidence disclosed that the father of the appellant and appellee owned a farm of 120 acres of land in Clark county, Illinois, upon which he resided before and at the time of his death, his wife and son Thomas constituting his

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family. He died intestate April 30, 1888, leaving his wife Mahala, as his widow, and Thomas, Edward and Sarah, his three children, as his only heirs at law, all of whom were adults.

His widow and children being desirous of saving the cost of an administration or other court proceedings, soon after his death divided among themselves all the personal property of his estate, and at the same time agreed that their mother should take, "as her homestead and dower," the farm, and have the rents and profits thereof during her lifetime. The mother and her son Thomas (appellant) then agreed to continue living on the farm as long as she lived, he to cultivate it and pay her, as rent, one-third of all the crops he raised. They continued to reside there, Thomas cultivating the farm and appropriating all the crops he grew, while the mother kept house for him until April 4th, 1897, when she died.

In 1889, Thomas purchased from his brother Edward, and in 1890, from his sister Sarah, their respective interests in the farm, taking from them deeds therefor, in each of which it appears that the conveyance was made "subject to the widow's homestead and dower interest." During the time that Thomas and his mother were occupying the farm under the arrangement above stated, he never paid her the promised rent, but borrowed at various times from her sums of money, the first being \$650 in the early part of 1891, when he wanted to pay his brother Edward \$1,000 as a part payment on a tract of land he purchased from him; again in the latter part of 1891, he borrowed from her \$300 when he was making a payment on eighty acres of land that he purchased from Mr. Dulaney; later on he borrowed from her \$40 to pay on a wheat drill; and several other times he borrowed \$10 of her at a time. His mother frequently asked him to pay her rent as he had promised, or to give her his note therefor, and also requested him to pay her the money he had borrowed from her; and at one time told him "she would make him leave the farm, so she could get some one that would pay her rent, if he did not;" at such

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times he would reply by telling her "he would pay as soon as he finished paying for the land he had purchased, and that she did not need a note as his word was good enough." His promises to pay her were made at various times, one as late as 1896. The one-third of the crops grown on the farm, while Thomas had it under the agreement with his mother, is shown to have been worth from \$100 to \$270 per year.

Thomas however denies in his testimony that he promised his mother to pay her rent, or that he borrowed any money from her except \$10, which he tendered to his brother Edward before this case was heard in the court below, and when he would not receive it, he left it with the clerk of the Circuit Court of Clark County for his use. He admits that he received money from her at various times, but says "it was money he gave her to keep for him, as she kept all his money for him."

After all the evidence was in, the appellant moved the court to instruct the jury to find for the defendant on the question of rent, at the same time presenting an instruction in writing to that effect, and requested the court to mark it "given," which motion and instruction the court refused.

It is urged that this motion should have been allowed and the instruction given for the reasons (quoting from the reasons in support of the motion) :

"(1) That dower and homestead were not assigned or set off to Mahala Pearce out of the real estate of which her husband was seized during their marriage; (2) that the rent of said real estate, if any, belonged to the heirs of John Pearce, deceased, and not to the estate of his widow; (3) that the real estate vested in this defendant, subject to the widow's dower and homestead unassigned, and so remained at the time of the death of said Mahala Pearce; and (4) rents, if any, are not recoverable in this action."

We are of the opinion that the appellant is not in a position to make the defense to this action that is suggested by his first three reasons, because the evidence shows that he had leased the farm from his mother in her lifetime, and had promised to pay her, as rent therefor, the one-third of

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all the crops he raised thereon from the time of his father's death until her death; and that under this arrangement he had been permitted by her to cultivate the farm for the time he and she had agreed upon, hence he is effectually estopped in this case to say that she had no such title to the farm as gave her authority to rent it to him, when sued by the administrator of her estate for the rent covering the very time he had cultivated it under the agreement. Nor do we think it is true, as urged by the appellant under his fourth reason, that the rent in question, being payable in crops under the agreement, can not be recovered in this action, for there was evidence to the effect that the appellant converted to his own use all the crops grown on the farm during the time in question; and it was also testified to by the witnesses A. J. Betts, Emmet Craig, Edward Pearce and Mike O'Roak, that the third of the crops, converted, was worth from \$100 to \$270 each year that the appellant had the farm rented from his mother, which is nowhere disputed, so that the court properly denied the motion and refused the instruction.

Counsel for appellant insist that the witnesses Edward Pearce (appellant), Sarah E. Craig and Emmet Craig, her husband, being interested in the result of this suit, were incompetent to testify against him on the rent question, as he is defending as heir.

We think there is no force in this contention, because if the appellant claims the rent sued for as heir of his father, they are competent for the reason it accrued after his father's death. As to the contention of appellant that the verdict is contrary to the evidence and the damages awarded excessive, we will say that after a full and fair consideration of all the testimony in the bill of exceptions, we find there is ample testimony to justify the conclusion reached by the jury that appellant owes for rent and borrowed money together, \$2,000.

The instructions complained of do not, in our opinion, contain prejudicial error, nor were the remarks and rulings of the trial judge complained of by the appellant of such a

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character as will justify our reversal of the judgment, otherwise, in our opinion, fully justified by the evidence; but we do not want to be understood as approving the remarks made by the trial judge to the defendant when he was testifying as a witness in his own behalf, for such criticism of a witness by the judge in the presence of a jury ought not to be made, and would be sufficient error, in a case close on the facts, to warrant a reversal of the judgment.

Finding no reversible error in the record, we affirm the judgment appealed from. Judgment affirmed.

City of Hoopeston v. Nellie Henry, by her Next Friend.

1. INSTRUCTIONS—*Properly Refused Where the Substance is Embraced in Others.*—Instructions are properly refused where the substance of what they each contain is embodied in other instructions that are given.

Action in Case, for personal injuries. Trial in the Circuit Court of Vermilion County; the Hon. FERDINAND BOOKWALTER, Judge, presiding. Verdict and judgment for plaintiff; appeal by defendant. Heard in this court at the November term, 1898. Affirmed. Opinion filed June 8, 1899.

M. G. WOOLVERTON, city attorney, for appellant; J. H. DYER, of counsel.

CHAS. A. ALLEN and SALMANS & DRAPER, attorneys for appellee.

MR. PRESIDING JUSTICE BURROUGHS delivered the opinion of the court.

This was an action on the case by the appellee against the appellant to recover damages for a personal injury received by the appellee on account of the alleged negligence of the officers of appellant. The case was tried by a jury in the Circuit Court of Vermilion County, and resulted in a verdict and a judgment in favor of the appellee for

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\$800, to reverse which the appellant prosecutes this appeal. While numerous errors have been assigned by the appellant, only three grounds for reversal have been urged by its counsel in their printed briefs and argument filed in this court, and they are: (1) the verdict is contrary to the evidence; (2) the damages are excessive; (3) and the court refused to give appellee's third and and fifth instructions.

The evidence shows that on the west side of Market street, in the city of Hoopeston, at a place between the sidewalk and the curbstone of the paved street, there was a lot of sweepings, rubbish, etc., allowed to accumulate, to which had been added other combustible refuse hauled there by a teamster employed by the city authorities. This caught fire from some unknown cause and communicated the fire to the sidewalk, but some water thrown upon it by persons living near there put the fire out that was then burning the sidewalk, and partially put it out in the pile of rubbish. One of the aldermen and the street commissioner of the city were notified of the fire burning there, and afterward one of the city's teamsters threw a lot of dirt over the rubbish, but the fire continued to smolder and burn slowly in the pile under the earth that had been thrown over it. The appellee, a little girl between three and four years old, lived with her father in a house on the same side of Market street where the fire was burning, and about thirty or forty feet distant from it. The child wishing to get something at a restaurant on the other side of the street, attempted to go over the place where this rubbish had been thus covered over, and her feet broke through the crust of earth on top, and went through into the smoldering fire below, burning her feet and ankles so badly that the skin and flesh came off, exposing the tendons to view and causing her great pain and suffering, but the wounds healed and there was no permanent injury left except some scars. From the time fire was first seen in this rubbish pile until this accident occurred about two weeks intervened, and an alderman, the street commissioner and a city teamster had been informed some six to ten days before the accident happened that the fire was burning at the place in question.

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The foregoing facts are practically undisputed, and we are satisfied they warranted the verdict rendered in favor of the appellee, and the amount of damages assessed, so that we ought not to reverse on that account. The third and fifth instructions of appellant were properly refused, because the substance of what they each contain was embodied in other instructions that were given.

Finding no reversible error in the record, we affirm the judgment appealed from.

Judgment affirmed.

Orrin F. Place v. The People ex rel., etc.

1. **QUO WARRANTO—Where the Writ Lies, Under the Statute.**—In case any person usurps, intrudes into, or unlawfully holds or executes any office or franchise, or any office in any corporation created by authority of this State, the attorney general or State's attorney of the proper county, either of his own accord or at the instance of any individual relator, may present a petition to any court of competent jurisdiction, or any judge thereof in vacation, for leave to file an information in the nature of a quo warranto in the name of the people of the State of Illinois.

2. **SAME—Who May Not Prosecute the Writ.**—A mere intermeddler, as a relator or otherwise, by employing the State's attorney to make a motion for that purpose, can not be permitted to prosecute a proceeding of this character, where he shows no such special interest in the corporation as would justify the court or judge in exercising the discretion given to it or him by the statute.

3. **SAME—Practice in this State.**—After the petition and information are properly filed and process ordered to issue, the case must then proceed in accordance with the strict rules of law in the same manner, and with the same degree of strictness, as in ordinary cases.

4. **SAME—Rules of Practice.**—Where the power is given by statute to enforce rights by petition and information in the nature of a quo warranto, and the required petition and information has been filed by leave of court or a judge, the respondent must, by answer or plea, either disclaim or justify, or the people will be entitled to a judgment of ouster.

5. **SAME—Pleas of Justification.**—In case the respondent attempts to plead by way of justification, he must set out his title specially. A general statement is not sufficient, but the plea must set up when and how he obtained his title.

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Quo Warranto.—Trial in the Circuit Court of Christian County; the Hon. WILLIAM M. FARMER, Judge, presiding. Finding and judgment of ouster; appeal by respondent. Heard in this court at the November term, 1898. Affirmed. Opinion filed June 3, 1899.

T. W. JOHNSTON and J. C. McBRIDE, attorneys for appellant; M. F. GALLAGHER, of counsel.

E. A. HUMPHREYS, State's attorney, for appellee; JAMES M. TAYLOR and FRANK P. DRENNAN, of counsel.

MR. PRESIDING JUSTICE BURROUGHS delivered the opinion of the court.

This was a petition presented to the Circuit Court of Christian County, in term time, by the State's attorney of that county, for leave to file the petition and information in the nature of a quo warranto thereto attached, which is in the name of The People of the State of Illinois, on the relation of Reuben Wilkinson, and against the appellant. The court granted the leave and ordered process to issue against the respondent, who filed a special plea to which the State's attorney interposed a demurrer, which was sustained. The respondent abided by his plea and declined to plead further, and the court gave judgment of ouster against him; he excepted and brings the case to this court by appeal, urging us to reverse that judgment on the ground that the court improperly sustained the demurrer and erroneously rendered judgment of ouster against him.

The petition avers that the Crowned King Mining Company is a corporation duly organized and doing business under the laws of Illinois, having its principal office at Edinburg, in Christian county, Illinois, and that the relator and two others, naming them, are its board of directors and have possession of all its property and business; that the appellant has for the past six months, in the county aforesaid, without any right, title or interest by election or otherwise, and against the express wishes and interest of said corporation, unlawfully usurped and intruded himself into, and unlaw-

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fully executed and is now unlawfully executing the office of president thereof, greatly to the damage of its business, and against the interest of the stockholders therein, and against the peace and dignity of the people of the State of Illinois, wherefore he prays that leave be given him to file the petition and attached information in the nature of a quo warranto, charging those facts and praying the court to call upon the respondent to show cause why he so usurps, intrudes into, and exercises the office of president of said corporation; and that upon a hearing, if the court finds the facts to be as above stated, that it will oust him from that office. Both the petition and the information are signed by the State's attorney of Christian county, and the petition is sworn to by the relator.

The special plea of respondent avers that on the second Wednesday of March, 1889, the appellant was "then and there made president of the said Crowned King Mining Company, a corporation, and he has ever since been and is now president thereof, and is entitled to that position," and that all subsequent meetings of both the stockholders and directors of that corporation were wholly void; that no president as successor to appellant was ever elected, or has any other person, except the appellant, ever been elected as such president; that the appellant is now, and has been acting as the president of said corporation since 1887; that the relator is not now, nor has he ever been such president, and denies all the charges made in the petition against him, and further denies that the relator is a director of said corporation.

Counsel for the appellant, in his printed brief filed and in his oral argument made in this court, claims that as the relator is urging only a private right in a private corporation, and the public have no legal concern therein, this is merely a civil action in his behalf, against the appellant, and since the relator is not, either by the petition or the information, averred to be the *de jure* or *de facto* president, therefore the demurrer to his plea ought to have been carried back and sustained to the petition and information; and

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that the court erred in sustaining the demurrer to his plea for that reason; and as the demurrer to the plea was only a general one, it was error to sustain it, for the further reason that the plea was a complete answer to the petition and information, as it made a general denial that the relator was a director of said corporation, and the petition failed to aver he was president thereof.

We think a complete answer to the first claim is, that the relator is not, in this case, contesting with the appellant for the office in question, but the petition and information do set up a good cause of action under the express provisions of our present statute entitled "Quo Warranto," so much of which as applies to this case being as follows:

"That in case any person shall usurp, intrude into, or unlawfully hold or execute any office or franchise, or any office in any corporation created by authority of this State, * * * the attorney general or the State's attorney of the proper county, either of his own accord, or at the instance of any individual relator, may present a petition to any court of competent jurisdiction, or any judge thereof in vacation, for leave to file an information in the nature of a quo warranto in the name of the people of the State of Illinois; and if such court or judge shall be satisfied that there is probable ground for the proceeding, the court or judge may grant the petition and order the information to be filed and process to issue." Sec. 1, Chap. 112, Starr and Curtis' Ill. Statutes (1896).

We are aware that it is the law that a mere intermeddler, as a relator or otherwise, by employing the State's attorney to make a motion for that purpose, ought not to be permitted to prosecute a proceeding of this character, where he shows no such special interest in the corporation as would justify the court or judge, in exercising the discretion given to it or him by the statute, to grant or refuse leave to file such information, as is expressly held in the case of *The People ex rel. v. North Chicago Ry. Co.*, 88 Ill. 537, and the cases therein cited. But in the case at bar, the petition of the State's attorney sworn to states that the relator is one of three persons constituting the board of directors of the corporation, who have possession of all of its property

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and business, thereby not only showing the relator not to be an intermeddler, but that he has such a special interest in the corporation, its property and business, as justifies the State's attorney in presenting the petition, and the court in granting the leave to file the information on the state of facts shown.

As to the other claim made by counsel for the appellant, we think the practice in this State is well established that after the petition and information are properly filed by leave of court or a judge thereof in vacation, and process ordered to issue, the case must then proceed in accordance with the strict rules of law, in the same manner and with the same degree of strictness as in ordinary cases. (See *The People ex rel. v. Golden Rule et al.*, 114 Ill. 34.) And the practice in such cases in this State is, that where the power is given by statute to enforce rights by petition and information in the nature of a quo warranto, and the required petition and information has been filed by leave of court or a judge, the respondent must by answer or plea either disclaim or justify, or the people will be entitled to a judgment of ouster. (See *Clark v. The People ex rel.*, 15 Ill. 213; *Carrico et al. v. The People ex rel.*, 123 Ill. 198; *Distilling and Cattle Feeding Co. v. The People ex rel.*, 156 Ill. 448; and *the People ex rel. v. City of Peoria*, 166 Ill. 517.) And in case the respondent attempts to plead, by way of justification, he must set out his title specially. (*Clark v. People, supra*; *Illinois Midland Ry. Co. v. People*, 84 Ill. 426; *Holden v. People*, 90 Ill. 434; *Carrico v. People, supra*; *Distilling, etc., Co. v. People, supra*; and *the People v. City of Peoria, supra*.) A general statement is not sufficient, but the plea must set up when and how he obtained title. *Clark v. People, supra*, and *Carrico v. People, supra*.

The plea in the case at bar only averring that the respondent "then and there was made president of said corporation, and has ever since been and is now president of and entitled to said position," was not sufficient. Nor was it sufficient to merely deny that the relator was not such president, nor was any one else, except the respondent, such president. There-

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fore the court properly sustained the demurrer thereto; and as the appellant declined to plead further, the court properly entered a judgment of ouster.

Judgment affirmed.

**Benjamin Frederick, etc., Mayor, v. The People ex rel.
Sun Electric Light & Power Co.**

1. CONTRACTS—*Of Municipalities.*—The rules governing the contracts of municipalities are not unlike those governing individuals or private corporations, so long as the matter is within the power of the municipality to contract.

2. CITIES AND VILLAGES—*Warrants for Lights Furnished Under an Illegal Contract.*—Where an electric light company furnished light for lighting the streets of a city and presented its claims therefor and the city council audited them knowing that the claimant had furnished the lights for the time in question under a contract with the city, and ordered warrants issued for the payment of such claims, it is the duty of the mayor to sign such orders, although the original contract for such lighting may have been invalid.

3. RATIFICATION—*Of the Executed Part of an Invalid Contract.*—A city council may ratify the executed part of an invalid contract for lighting the streets and order warrants to issue to pay for lights furnished, even though it has declared the contract under which such lights were furnished invalid.

Mandamus.—Appeal from the Circuit Court of Tazewell County; the Hon. LESLIE D. PURTERBAUGH, Judge, presiding. Heard in this court at the November term, 1898. Reversed and remanded. Opinion filed June 3, 1899.

ELLWOOD & MEEK and T. N. GREEN, attorneys for appellant.

IRWIN & SLEMMONS and J. W. DAUGHERTY, attorneys for appellee.

MR. PRESIDING JUSTICE BURROUGHS delivered the opinion of the court.

This was a petition filed in the Circuit Court of Tazewell County, in which the appellee sought by mandamus to com-

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pel the appellant, as mayor of the city of Washington, in that county, to sign three city warrants that had been issued by the city clerk to the relator (The Sun Electric Light and Power Co.) by order of the city council of that city, in payment of its claims for lighting the streets of that city with electric lights during the months of May, June and July, 1898, under what is averred to have been a valid contract with the city for that purpose.

It is further averred that bills against the city for such lighting had been presented by relator to the council, which were by it allowed, and three warrants ordered to be issued to relator therefor, each being for \$101.20; and that relator had requested the appellant as mayor to sign same, but he refused to do so.

To this petition the appellant filed an answer in which he sought to justify his refusal to sign the warrants on the ground that the contract between the city and the relator, under which the lighting was done, was made in 1895; and, as it professed to authorize the relator to light the streets for the six years then next ensuing, it was void, because extending for a time beyond the terms of the then members of the city council; and also upon the further ground that the city council, by resolution properly passed at its regular meeting in March, 1898, had declared said contract ended and to be void from and after May 1st, 1898; and although at its meeting in June, 1898, it had rescinded its resolution and declared the contract of 1895 to be in full force and effect, yet that did not make the contract valid. To this answer the appellee filed a demurrer, which the court sustained, in so far as it related to the June and July warrants, but overruled it as to the May warrant. Each party abided by their pleading and the court ordered a peremptory writ of mandamus to issue, requiring the appellant, as mayor, to sign the warrants for the lighting done in June and July. Appellant and appellee both excepted to the order, and each prayed an appeal to this court.

The appellant prosecutes this appeal and insists the Circuit Court erred in sustaining the demurrer to his answer

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as to the warrants for June and July; and the appellee assigns as a cross-error the overruling of its demurrer to the answer as to the warrant for May.

The pleadings aver that the warrants in dispute were issued to the relator by order of the city council, in payment of their claims against the city, presented to the city council for street lighting that had been already furnished; and that the city council had audited these bills or claims, knowing that the relator claimed to have furnished the lights for the time in question under a contract with the city which relator then insisted was valid.

Without any reference to whether the executory part of the contract of 1895 is or is not valid, it appears that only the executed part of that contract is involved in this case. The city council, as constituted in 1898, when the street lighting in question was furnished, had the power to contract and pay for such lighting; and by his answer to the petition, the appellant admits the city council, after the lighting for each of the months in question had been furnished by the relator under the claim that the contract of 1895 was in force, audited the claims or bills of relator therefor and ordered the three warrants issued in payment thereof.

This, we think, was a ratification of so much of the contract of 1895 as was executed in May, June and July. (See *East St. Louis v. East St. Louis Gas Light & Coke Co.*, 98 Ill. 415, and cases therein cited.) And as the city council ordered the warrants issued to relator in payment of these claims, it was the plain duty of the appellant to sign each of them on demand.

The amended petition, which was the one answered, further averred that provision had been made in the annual appropriation ordinance for the fiscal year in which the electric lights in question were furnished for paying for lighting the streets for the time in question, which was not denied by the appellant in his answer. The city council therefore is shown to have had the power and the means to contract and pay for having the streets lighted for the

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time in question; and as it was admitted that the relator had furnished the lights and insisted it had a valid claim against the city, on that account, for \$101.60 for each of those months, which the city council audited, allowed and ordered warrants to be issued in payment therefor; in the absence of any fraud being claimed, these facts made the warrants valid by way of a settlement of a disputed claim against the city; for which reason also it was the duty of the appellant, as mayor, to sign the warrants.

We therefore think the Circuit Court erred when it overruled the demurrer to the answer, in so far as it related to the warrant for May, for which reason we reverse the judgment and remand the case to that court, with directions to sustain the demurrer to the answer *in toto*, and then proceed in this case as to law and justice appertain. As the record is free of the error claimed by the appellant, but does contain the error contended for by the appellee under the cross-error assigned, we order the costs in this court taxed to the appellant. Judgment reversed and case remanded with directions.

Allison Peck v. Hannah Gibeson.

1. **HUSBAND AND WIFE—*Implied Authority of the Wife to Bind the Husband.***—While the wife is living separate and apart from her husband, on account of his cruelty toward her, she has implied authority to bind him for the board and lodging of their minor children.

Assumpsit, for boarding and lodging. Trial in the Circuit Court of Moultrie County, on appeal from a justice of the peace; the Hon. WILLIAM G. COCHRAN, Judge, presiding. Verdict and judgment for plaintiff; appeal by defendant. Heard in this court at the November term, 1898. Affirmed. Opinion filed June 3, 1899.

JOHN R. & WALTER EDEN, attorneys for appellant.

E. J. MILLER, attorney for appellee.

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MR. PRESIDING JUSTICE BURROUGHS delivered the opinion of the court.

The record shows that the appellee commenced this suit before a justice of the peace in Moultrie county, to recover from the appellant the sum of twenty dollars for boarding and lodging his three minor children for two weeks under the circumstances hereinafter set forth. The case went to judgment, and by appeal was taken to the Circuit Court of that county, and was there tried by a jury, the appellee recovering a verdict and judgment for four dollars. The appellant prosecutes this appeal and insists upon our reversing that judgment on the grounds that the court improperly refused some and modified other of his instructions; improperly gave some instructions for the appellee that were erroneous, and that the verdict is contrary to the law and evidence.

The evidence shows that on December 18, 1896, the wife of appellant left their home on account of his cruelty to her and went to the house of the appellee, a near neighbor, to stay until she could get a house to move into. Without objection from, and with the knowledge of her husband, she took their three minor children along with her, and they lodged and boarded with the appellee for about two weeks, after which the wife moved into a house she had procured for that purpose. This board and lodging of the children is shown by the evidence to be reasonably worth about \$16.50. The appellant, in person, never requested the appellee to lodge or board these children, or promised to pay her therefor. As soon as the wife left appellant, she commenced proceedings against him for divorce for his cruelty toward her and obtained the same for that reason, never living with him afterward.

Under these circumstances we are of the opinion that the wife had implied authority to bind the husband and father for the board and lodging of their minor children while she and they were living separate and apart from him on account of his cruelty toward her, without his objection, and impliedly by his permission. The mother took the

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children to the appellee's house and they were boarded and lodged there at her request, and we think, under the circumstances, she had implied authority to bind him to pay for the same. *McMillen v. Lee*, 78 Ill. 443.

The amount of the verdict clearly indicates that the jury were not prejudiced against the appellant by any errors in the rulings of the court on the instructions; and while we can see that the instructions complained of are open to some of the objections urged against them, yet, on the whole record, the verdict is in accordance with the evidence, and for that reason we affirm the judgment.

B. F. Ellsworth v. Fred G. Varney.

1. APPELLATE COURT PRACTICE—*Propositions of Law Must be Shown in the Abstract.*—Propositions of law which do not appear in the abstract will not be discussed in this court.

2. PROMISSORY NOTES—*Recovery upon, by an Indorsee.*—To entitle an indorsee to recover from the indorser upon a promissory note, he must show that, by reason of the insolvency of the maker, no suit against him would have been availing, and that the written assignment made by the indorser at the time he delivered the notes to the plaintiff carried with it the liability of a general indorser.

3. SAME—*Qualified Indorsements.*—An indorsement upon a promissory note in these words, "For value received, I hereby convey my right, title and interest in within notes to E," is a qualified indorsement and expresses no further intention than to pass the title and interest which the indorser had in the notes at the time.

4. SAME—*General and Qualified Indorsements.*—The interest passing by the usual indorsement is much greater than the mere interest of the payee, and where the indorsement only attempts to pass the right, title and interest of the payee of the note, no greater right, title or interest than he then had can pass.

Assumpsit, on promissory notes. Trial in the Circuit Court of Pike County; the Hon. HARRY HIGBEE, Judge, presiding. Finding and judgment for defendant; appeal by plaintiff. Heard in this court at the November term, 1898. Reversed. Mr. Justice WRIGHT dissenting. Opinion filed June 8, 1899.

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Wm. Mumford and W. I. Klein, attorneys for appellant.

The rights of the holders of notes, and the liability of all parties upon the same, shall be according to the rules in case of inland bills of exchange, but when suit would have been unavailing, or the maker had absconded, etc., "such assignee or holder may recover against the assignor as if due diligence by suit had been used." Hurd's St. 1895, p. 1061, Sec. 7.

Every indorser of any instrument mentioned in this section shall be held as a guarantor of payment, unless otherwise expressed in the indorsement. Hurd's St. 1895, p. 1062, tit. Neg. Ins., par. 8.

Every indorser shall be liable if assignee used due diligence against the maker, or if suit would have been unavailing, or if maker had absconded, etc. Hurd's R. S. 1889, p. 944, tit. Neg. Ins., Sec. 7.

Where suit would have been unavailing, etc., indorser's liability not dependent upon due diligence against maker of instrument. Crouch v. Hall, 15 Ill. 263; State Bank v. Hawley, 1 Scam. 580; Pierce v. Short, 14 Ill. 144; Wilder v. DeWolf, 24 Ill. 190; Clayes v. White, 83 Ill. 540; Babcock v. Blanchard, 86 Ill. 165; Harding v. Dilly, 60 Ill. 528.

Notorious insolvency makes indorser liable. Humphreys v. Collen, 1 Scam. 47; Garrity v. Betts, 20 Ill. App. 327.

An indorsement of a note is at once a transfer of the title, and a contract pledging the indorser's credit for the honor of the bill. Norton on Notes and Bills, 106, 107, and cases there cited; Norton on Notes and Bills, 125.

In the effect of the indorsement, the law looks to the intention, rather than to the form of the words. Norton on Notes and Bills, 108.

W. E. Williams, attorney for appellee; Jefferson Orr, of counsel.

Where the assignment is out of the usual and ordinary way, it does not imply the same liability as a blank indorsement. Aniba v. Yeomans, 39 Mich. 171; Hailey v. Falconer, 32 Ala. 536.

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In Michigan, where the payee wrote on the back of the note, "I hereby transfer my right, title and interest of the within note to S. C. Y.," it was held that such transfer was not an indorsement in the sense of the law merchant, but merely passed title, not rendering the assignor liable as an indorser. *Aniba v. Yeomans*, 39 Mich. 171.

In Alabama it has been held that the following indorsement is but a mere transfer of title and creates no liability against the assignor: "I transfer all my right and title to the within note to be enjoyed in the same manner as may have been by me." *Hailey v. Falconer*, 32 Ala. 536.

In Pennsylvania, where there was a trade or exchange of specific articles for certain notes in payment, with the agreement at the time of the assignment that the assignor should assume no responsibility, the court held that proof of the contemporaneous parol understanding was competent, and that the indorsement should not be perverted to a use never intended, but that the intention of the parties should prevail. *Hill v. Ely*, 5 Serg. & R. (Penn.) 363; *Breneman v. Furniss*, 90 Penn. St. 186; *Ross v. Espy*, 16 P. F. Smith (Penn.), 481; *Taylor v. French 2 Lea*, 257, 31 Am. Rep. 609.

MR. JUSTICE HARKER delivered the opinion of the court.

This suit was brought by appellant against appellee as the indorser of two promissory notes for \$500 each, executed by Leora V. Cady on the 10th of June, 1893, payable to her order and due three years after date.

It appears from the record that appellee purchased from appellant a stock of groceries, and in payment for the same gave \$58 in money and the two notes. Leora V. Cady had indorsed them in blank, and there appeared on the back of each the following indorsement: "Chicago, Dec. 1, 189-. Transferred from Frank E. Trude to F. G. Varney." When appellee delivered them to appellant he, at the suggestion of appellant, made the following indorsement:

"WARSAW, July 2nd, 1895.

For value received I hereby convey my right, title and interest in within notes to B. F. Ellsworth.

F. G. VARNEY."

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The declaration contained three special counts and the common counts. We shall notice only the second count as it was the only one under which proofs were offered. It charged that the maker of the note was insolvent, so that suit against her would have been unavailing. To it the defendant plead the general issue and two special pleas. First, that plaintiff had real estate security for the notes, ample and sufficient for their payment. Second, that the parties at the time of the transfer of the notes had a parol agreement that there should be no liability over against the defendant. A jury was waived and a trial had by the court, resulting in a judgment for the defendant and against the plaintiff for costs.

The chief contentions upon which a reversal of the judgment is grounded are: First, that the court erred in the holding in certain propositions of law that an indorser of a promissory note may show a parol contemporaneous agreement inconsistent with the written indorsement. Second, that the court erred in admitting testimony of an oral agreement to the effect that the defendant should not be liable as a general indorser. Third, that the court erred in finding as a fact, from the evidence, that there was such an oral agreement. As the propositions of law do not appear in the abstract we shall not discuss them, and in the view taken by us of Elsworth's lack of diligence to collect from the maker of the notes and the indorsement made by Varney we do not consider it necessary to express ourselves upon the other points of contention made by appellant.

To entitle him to recover it devolved upon the plaintiff to show that by reason of the insolvency of Leora V. Cady no suit or proceeding against her would have been availing, and that the written assignment made by the defendant at the time he delivered the notes to the plaintiff carried with it the liability of a general indorser.

The proof shows that the notes in question were secured by a deed of trust on eight city lots located in the outskirts of Chicago, valued at from \$2,200 to \$3,000.

There was a prior mortgage on the same property for

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\$600. While it appears that Leora V. Cady had no other property than the lots mentioned, it does not appear that any effort was made to collect the notes by foreclosure proceedings or otherwise. The lowest estimate placed upon the value of the lots exceeded the amount of the first mortgage debt \$1,600. It would seem, then, that Ellsworth was not in a very good position to maintain his suit against Varney as an indorser upon the ground that suit against the maker would have been unavailing.

A majority of the court are of the opinion that another reason why Elsworth can not maintain his suit against Varney is to be found in the peculiar phraseology of the assignment indorsed. The indorsement is not in the usual form, but substantially different therefrom. The usual indorsement upon a negotiable promissory note is something more than a mere transfer of the interest of the payee therein. Under our statute it includes the personal undertaking of the indorser to pay the note if, at maturity, the maker is insolvent or has absconded from the State. Every indorsement by the payee made upon transferring the instrument is held to have that dual effect unless the words employed demonstrate the intention to make the indorsement a qualified one. An indorsement in blank has that effect. But where the words employed in the indorsement demonstrate an intention on the part of the indorser to make the indorsement a qualified one, courts will give it a different effect and one in harmony with the intention. Familiar examples of qualified indorsements are those made "without recourse," "at the assignee's own risk" and "with intent only to transfer my interest, and not to be subject to any liability in case of non-payment by the maker." (Story on Promissory Notes, Sec. 146; Randolph on Commercial Paper, Secs. 720 and 721.) They are qualified indorsements because the words employed in each clearly demonstrate an intention of the indorser to avoid personal liability for the default of the maker. In the indorsement before us the words, "For value received, I hereby convey my right, title and interest in within notes to B. F. Ellsworth," express no

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further intention than to pass to Ellsworth the title and interest which Varney had in the notes. Having expressed but one of the two legal implications flowing from a general indorsement, or an indorsement in blank, we are constrained to hold that the indorser intended to exclude the other implication. In the case of *Aniba v. Yeomans*, 39 Mich. 171, the indorsement was identical with this one and the suit was by Yeomans, the indorsee, against Aniba, the indorser. In speaking of the effect of such an indorsement the Michigan court said:

“The right or interest passing under the usual and customary indorsement is much greater than the mere right, title and interest of the payee, and where the transfer, as made, only attempts to pass the title and interest of the payee of the note, no greater right or interest than he then held can pass. The transfer in this case gave Yeomans the same rights that Aniba then had, but none other or greater. Yeomans could look to the makers thereof as Aniba could have done, but beyond this he could not go. To permit him to fall back upon Aniba, in case Aniba could not have collected, would be giving him more than Aniba’s right and interest in the note.”

To the same effect is the holding of the Supreme Court of the State of Alabama in *Hailey v. Falconer*, 32 Ala. 536.

Independent of the action of the Circuit Court in allowing parol proof to show that it was agreed that Varney should not be held liable for the maker’s default in paying the notes and the finding of the court that there was such an agreement we hold that appellant was not entitled to recover and that the judgment was right. Judgment affirmed.

Mr. Justice WRIGHT dissents from what is said in the foregoing opinion about the indorsement being a qualified one.

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Sarah J. C. Clarke v. John B. Hunter.

1. CONTRACTS—*Where Different Instruments are Executed as Evidence of one Transaction.*—Where different instruments are executed as evidence of one transaction or agreement they are to be read together and construed as one instrument.

2. PROMISSORY NOTE—*Definition.*—A promissory note is “a written promise by one person to pay another person therein named, or order, a fixed sum of money, at all events and at a time specified therein, or at a time which must certainly arrive.”

3. SAME—*When Not Payable on a Contingency.*—A note is not payable on a contingency because the maker has the option of paying it on or before a certain date, and such a provision does not destroy its negotiability.

4. SAME—*Requisites as to Validity.*—To constitute a valid promissory note, it must be for the payment of money which will certainly become due some time, although it is uncertain when that time will come. And where the payment depends upon a contingency, it makes no difference that such contingency does in fact happen afterward, for its character as a promissory note does not depend upon future events, but solely upon its character when created.

5. SAME—*Duty of Maker in Making Payments.*—The maker of a promissory note must know at his peril that the person to whom he makes payment has authority to receive it, and he who is negligent in this regard must bear the loss of his dereliction rather than an innocent person.

6. SAME—*Negotiable, Although Secured by Mortgage.*—A promissory note, although secured by mortgage, is still commercial paper assignable at law.

Assumpsit.—Trial in the Circuit Court of Sangamon County; the Hon. JAMES A. CREIGHTON, Judge, presiding. Finding and judgment for defendant; appeal by plaintiff. Heard in this court at the May term, 1898. Reversed and judgment entered in this court for appellant. Opinion filed June 3, 1899.

GREENE & HUMPHREY, attorneys for appellant.

A promissory note, though secured by a mortgage, is still commercial paper, assignable at law; and when the remedy is sought upon that, all the rights incident to commercial paper will be enforced in the courts of law; but when resort is had to a court of equity to foreclose the mortgage, that court will let in any defense which would have been

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good against the mortgage in the hands of the mortgagee himself; this, regardless of the fact that the assignee may have purchased the notes in good faith, and before their maturity. Olds v. Cummings, 31 Ill. 188.

A defense good in equity is not good at law as against the assignee before maturity of commercial paper. Kleeman v. Frisbie, 63 Ill. 482; Haskell v. Brown, 65 Ill. 29.

It is the duty of a person paying a note to use reasonable and ordinary precaution to avoid imposition, for it is against reason that a party who stands fair should suffer for the negligent conduct of another. Anderson v. Warne, 71 Ill. 22; Keohane v. Smith, 97 Ill. 156; Bank v. Beaird, 7 Ill. App. 80.

GRAHAM & MILLER and BEACH & HODNETT, attorneys for appellee.

Provisions in mortgage and not found in note will control. Dan'l Neg. Inst., Sec. 835; Tiedeman on Com. Paper, Sec. 40.

It is a requisite of the negotiability of a promissory note that the instrument should only call for payment of money. If the paper should provide for the payment of money and the doing of something else, it is deprived of the character of negotiability and becomes an ordinary contract. Tiedeman on Com. Paper, Sec. 29; Randolph on Com. Paper, Vol. 1, Sec. 208; Van Zandt v. Hopkins, 151 Ill. 248.

The note, when construed with the mortgage, which is part of it, is not negotiable. Lowe v. Bliss, 24 Ill. 168; Van Zandt v. Hopkins, 151 Ill. 248; Brooke v. Struthers, (Mich.), 35 L. R. A. 536; Iron City Nat. Bank v. McCord, 139 Pa. St. 52; Costello v. Crowell, 127 Mass. 293; Overton v. Tyler, 3 Pa. St. 346; Sweeney v. Thickstun, 77 Pa. St. 131; Windsor Savings Bank v. McMahon, 3 L. R. A. 192; Warren v. Gruwell et al. (Kas.), 48 Pac. Rep. 205; Chapman v. Steener et al. (Kas.), 48 Pac. Rep. 607.

MR. JUSTICE HARKER delivered the opinion of the court. On February 20, 1889, appellee executed and delivered to

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Edward T. Oliver a promissory note of which the following is a copy:

“\$5,000. SPRINGFIELD, Ill., February 20, 1889.

On March 1, 1894, after date, value received, for money loaned, I promise to pay to the order of Edward T. Oliver, five thousand dollars, with interest on the same at the rate of eight per cent per annum after due until paid, according to the tenor of a certain mortgage deed, bearing even date herewith, given by John B. Hunter and wife to Edward T. Oliver.

Payable at the State National Bank with exchange.

JOHN B. HUNTER.”

To secure its payment he and his wife at the same time executed and delivered to Oliver a mortgage on certain lands in Logan county, of which the following is a copy:

“The mortgagors, John B. Hunter and Elizabeth E. Hunter, his wife, of the county of Sangamon and State of Illinois, for and in consideration of five thousand dollars in hand paid, mortgage and warrant to Edward T. Oliver, of the county of Sangamon, the following described real estate, to-wit: The southwest quarter of section eleven (11), east half of the northwest quarter of section fourteen (14), and eighteen (18) acres of the east half of southwest quarter, section twelve (12), and all in township seventeen, north of range two, west of third principal meridian, 258 acres in all, together with all the rents, issues and profits thereof, situated in the county of Logan, in the State of Illinois, hereby releasing and waiving all rights under and by virtue of the Homestead Exemption laws of this State, to secure the payment of eleven promissory notes of even date herewith, executed by said John B. Hunter and payable to the order of said Edward T. Oliver, as follows: One principal note for the sum of five thousand dollars, payable on the first day of March, 1894; one interest note for the sum of one hundred and fifty dollars, payable on the first day of September, 1889; and nine interest notes for the sum of one hundred and fifty dollars each, and payable, respectively, on March 1, 1890; September 1, 1890; March 1, 1891; September 1, 1891; March 1, 1892; September 1, 1892; March 1, 1893; September 1, 1893; all bearing interest at the rate of eight per cent per annum from maturity until paid, payable semi-annually.

“Now if said notes are paid when due according to their

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tenor and effect, then this mortgage to be null and void, otherwise to be and remain in full force, provided that the neglect or refusal to pay any of said notes when due or in case of waste or non-payment of taxes and assessments, or the neglect to insure and to keep insured the buildings on said premises in the amount of at least — hundred dollars, in such company as the legal holder of said note may direct, for the benefit of such legal holder does, it is hereby agreed, render the principal note with all accrued interest thereon immediately due and payable by the said John B. Hunter, at the option of the legal holder of said note, and this mortgage may be foreclosed. And the said John B. Hunter and Elizabeth Hunter hereby waive notice of such option and authorize and empower Geo. M. Brinkerhoff, or any attorney of any court of record, to enter the appearance of the said John B. Hunter and Elizabeth E. Hunter, upon the filing of any bill to foreclose this mortgage in any court having jurisdiction thereof, and to file an answer for the said John B. Hunter and Elizabeth E. Hunter, stating the amount that may then be due and owing on said notes in this mortgage mentioned, for principal and interest, also for costs, taxes, assessments, insurance, attorney's fees and other money expended under the provisions contained herein, whether the same be due by the terms of this mortgage or by the option of the said Edward T. Oliver, his heirs, executors, administrators or assigns, and to consent and agree to a decree being entered for the amount therein stated to be so due and owing, in favor of the said Edward T. Oliver, his heirs, executors, administrators or assigns; that no appeal shall be taken from such decree, and no writ of error.

"In the case of the filing of any bill to foreclose this mortgage, this court may appoint Geo. M. Brinkerhoff, or any competent person, receiver with power to collect the rents and profits arising out of said premises during the pendency of such foreclosure suit and until the right to redeem said premises expires and such rents and profits so collected shall be applied to the payment of taxes, insurance, or toward the payment of such indebtedness upon the foreclosure of this mortgage by proceedings in court; and in case said premises are occupied by the mortgagors, they hereby agree to become tenants of such receiver or to surrender immediate possession of said premises to him. The costs of such foreclosure shall be paid by the mortgagors, which shall include a reasonable solicitors' fee, not

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to exceed five per cent, to be taxed by the court and collected as other costs.

"Dated this twentieth day of February, A. D. 1889.

"Signed, sealed and delivered in the presence of Lewis Grubb.

[SEAL.]

"JOHN B. HUNTER,
"ELIZABETH HUNTER."

On March 19, 1889, Oliver assigned the note and mortgage without recourse to David Saunderson, trustee. On July 12, 1890, appellee conveyed the land to his son, O. J. Hunter, subject to the mortgage. On February 4, 1891, O. J. Hunter conveyed the land to Caleb K. Lucas and George T. Lucas without referring to the mortgage. On April 15, 1891, Caleb K. Lucas notified Oliver that he desired to make a payment of \$3,000 on the note, whereupon arrangements were made between Oliver and Saunderson to receive the money although the note was not due. On April 27, 1891, Lucas remitted by draft to Brinkerhoff & Oliver \$3,120—\$3,000 of which was to be credited on the note. The note was at that time in the possession of Saunderson, and was not credited with the \$3,000 payment.

Early in the year 1892 Saunderson sold and assigned the note and mortgage to Brinkerhoff & Oliver, and they, on the 18th of March of that year, sold and assigned them to appellant for \$5,015. After the payment of the \$3,000 by Lucas, Brinkerhoff & Oliver paid interest on the \$5,000 to Saunderson up to the time that he sold to them and they received interest from Lucas on the remaining \$2,000. All payments made by Lucas up to the 10th of November, 1893, were made by him to Brinkerhoff & Oliver. He first learned in October of that year that appellant had bought the paper, and on the 10th of November he paid the interest on \$2,000 to her husband. He also learned then, for the first time, that the note had never been credited with the \$3,000 payment made by him. Oliver was then dead and the effects of Brinkerhoff & Oliver were in the hands of a receiver. Lucas has fully paid the remaining \$2,000 and interest thereon. Appellant was ignorant of the fact that Lucas had paid the \$3,000 at the time of purchasing

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the note. This suit was brought by her to recover from appellee, the maker of the note, its face value, less what had been paid her and interest. A trial by the court resulted in a judgment against her.

In the presentation of this case counsel have assumed that the right of appellant to recover depends entirely upon whether the note sued on is a negotiable instrument. Upon the one hand it is argued that it is negotiable, and that she can not, therefore, be prejudiced by the payment of the \$3,000 made by Lucas, because she took it before maturity and without notice of the payment. Upon the other hand it is argued that it is not negotiable, and that she took it subject to all defenses that could have been made had the suit been brought in the name of the original payee.

It is a familiar rule of law that where different instruments are executed as evidence of one transaction, or agreement, that they are to be read together and construed as one instrument. Applying that rule to this case, we will look to the mortgage to see whether there is anything therein contained which deprives the note of its negotiability. It can not be claimed that there is anything affecting it in that regard other than what relates to payment. By reference to the mortgage it will be seen that its provisions relating to the note are that it is made to secure the payment of one principal note of \$5,000, payable on the 1st of March, 1894, and ten interest notes for \$150 each, payable in succession every six months, to the order of Edward T. Oliver; that if the notes are paid when due the mortgage shall be void, otherwise to remain in force, provided that the neglect or refusal to pay any of the notes when due, or in case of waste or non-payment of taxes and assessments, or the neglect to insure and keep insured the buildings on the mortgaged premises, in the amount of at least — hundred dollars, in such company as the legal holder of the note may desire, for the benefit of the holder, it is agreed will render the principal note with accrued interest immediately due and payable, at the option of the legal holder, and that the mortgage may be foreclosed; and then provisions fol-

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low for filing a bill to foreclose the mortgage for the amount due upon the notes and for costs, taxes, assessments, insurance, attorney's fees, and money expended under other provisions of the mortgage, including a reasonable solicitor's fee, not exceeding five per cent, to be taxed as other costs.

What effect have these provisions in the mortgage upon the payment of the \$5,000 mentioned in the note?

The mortgage says the note is payable March 1, 1894, with eight per cent interest after maturity, and so says the note. The only independent provision of the mortgage is that which gives the holder the option to declare the note due upon the neglect or refusal of the mortgagor to pay interest notes when due, or to pay taxes or assessments, or neglect to insure, and to foreclose the mortgage. This clause was inserted for the benefit of the holder of the note, and under which the maker could claim no rights. Upon an offer to purchase the note and mortgage by a legal holder before the maturity thereof, the information would be furnished by the documents themselves that no previous holder had exercised such option, and it is hard to imagine any sufficient reason why such an option, merely, would destroy the negotiable quality of the note. The \$5,000 is absolutely and certainly payable on the 1st day of March, 1894, with or without the mortgage, unless the maker neglects or refuses to do certain things, and for such cause the holder elects to exercise the option given to him, acts that were known to appellant to have been unperformed at the time she purchased and received the assignment of the note before it was due.

Various definitions have been given of a promissory note. The one given by Mr. Justice Magruder, in Dorsey v. Wolff, 142 Ill. 589, is as clear and comprehensive as any seen by us. It is there defined as "a written promise by one person to pay another person therein named, or order, a fixed sum of money, at all events, and at a time specified therein, or at a time which must certainly arrive." Applying that definition to the note involved in this suit, after reading

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into it all the provisions in the mortgage relating to its payment, can it be justly said that it does not fulfill every element of the definition?

It is nothing more nor less than a written promise of the maker to pay another person therein named, or order, a fixed sum of money (\$5,000) at all events, and at a time specified therein (March 1, 1894), or at a time which must certainly arrive. Not a single condition or stipulation is contained in the mortgage rendering the note uncertain as to the payment at all events. The time for its payment must certainly arrive, absolutely and at all events. If not called by the holder, by reason of the delinquency and wrong of the maker, before March 1, 1894, then as that time must certainly arrive, it is then due, thus fitting into every requirement of the definition. It was said in *Dorsey v. Wolff*, *supra*: “The notes are not payable on a contingency, because the maker has the option of paying on or before a certain date.” So, in the case presented, the note is not payable on a contingency because the holder has the option, in the event of the delinquency of the maker, to require payment, or in default to foreclose the mortgage before the specified date, for in either event its time of payment is sure to come. In the case of a note payable on or before a given date, at the option of the maker, it is uncertain whether the maker will exercise such option, but the date specified for its payment is sure to come, and hence the court holds that such a note is not payable on a contingency, and is negotiable. So, in the case presented, the note is payable on a given time, subject to the option of the holder to demand it at an earlier time in case the maker is delinquent in certain respects. It is uncertain, like the other case, whether the holder will exercise such option, but it is absolutely certain that the time, March 1, 1894, would arrive and the note is not payable on a contingency, and therefore is negotiable.

And here it may be pertinent to observe that the mortgage only authorizes the option to be exercised by the holder for the purposes of its foreclosure, leaving the note

wholly unabridged by the mortgage in respect to the legal rights and remedies of the parties in a suit at law, such as we are considering.

Much reliance was placed, by counsel for appellee in the argument, upon the decisions of the Supreme Court of Michigan, as affording rules for different construction of the note than the one which it is contended by appellant should be given to it. In *Brooke v. Hargreaves*, 21 Mich. 254, it was said: "That a note was not negotiable when the criterion of time of payment depended upon the volition of a third party, and it must be payable at a time which must certainly arrive in the future, upon the happening of some event or the completion of some period not depending on the volition of any one;" and counsel insisted upon the application of the rule so declared to the note herein. We can see no substantial distinction in the statement of the rule in *Brooke v. Hargreaves*, *supra*, and the statement of the rule by our own Supreme Court. Both are in effect the same. The criterion of time in the note here in question does not depend on the volition of a third party, and is payable at a time which must certainly arrive in the future, upon the happening of some event, the conditional option of the holder or the completion of a period not depending on the volition of any one, March 1, 1894. One of the events was inevitable and bound to occur, and it is immaterial that one of them was uncertain or contingent.

In *Bird v. Pope*, 73 Mich. 483, relied upon by counsel for appellee, the note provided that if it was not paid at maturity, the property for which it was given should belong to the payee, and to the same effect in substance was *Bank v. Carson*, 69 Mich. 437, cited by counsel. In such cases the effect of the note would be to provide a different method of payment than in money, and all would agree its negotiable quality would, under the law merchant, thereby be destroyed but they have no application under our statute as it existed at the time the note was executed. Other cases are cited and relied upon from different States, which, as we believe, have little or no reference to the question here pre-

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sented. Some of these cases go to the extent of holding that a stipulation contained in the note for attorney fees, and the like, render a note non-negotiable, but, as has been seen, these decisions are not in harmony with the decisions of our own Supreme Court upon similar questions.

In *Archer v. Claflin*, 31 Ill. 306, it was held that under our statute it need not be expressed in a note to be for value received, nor payable to order, to make it negotiable, nor need it have a date, as delivery gives it effect; and no time being specified (for its payment), it is payable on demand.

As regards the objection to the negotiability of the note here presented, on the ground that its time of payment is uncertain and contingent, can it be justly said that there is certainty of the time of payment of a note in which no time of payment is specified and uncertainty of time in another note in which it is specified that the holder may have the option, contingent on the delinquency of the maker, to demand payment, and the absolute right on a date specified?

Again, in *White v. Smith*, 77 Ill. 351, it was held that a written promise to pay a certain sum of money to a railroad company, or order, in such installments and at such times as the directors of the company may from time to time assess or require, is a valid, negotiable, promissory note, being in effect payable on demand. In that case it was said by the court:

“The principle is undoubted that to constitute a valid promissory note, it must be for the payment of money which will certainly become due one time or other, although it be uncertain when that time will come. And where the payment depends upon a contingency it will make no difference that the contingency does in fact happen afterward on which the payment is to become absolute, for its character as a promissory note can not depend upon future events, but solely upon its character when created.”

And so applying this statement of the law to the case presented the note would, by its character when created, certainly become due one time or other, namely, March 1, 1894,

and was therefore negotiable. In the same case the court say further:

"The instrument in question does seemingly depend for its payment upon a contingency. But there is a class of cases, says Judge Story, which at first view seem to import that payment is to be made only upon the occurrence of events which may never happen, and yet which are uniformly held to be absolutely payable at all events. Thus, if a note be payable at sight, or ten days after sight, or ten days after notice, or on request or on demand, in all these and the like cases the note will be held valid as a promissory note and payable at all events, although in point of fact the payee may die without ever having presented the note for sight, or without having given any notice to or made any request or demand upon the maker for payment. But the law, in all cases of this kind, deems the note to admit a present debt to be due the payee, payable absolutely and at all events, whosoever and by whomsoever the note is presented for payment according to purport." Story on Promissory Notes, Sec. 29.

So in Cisne v. Chidester, 85 Ill. 523, it was held that a note made payable "on the first day of September, 1871, or before, if made out of the sale of J. B. Drake's horse hay fork and hay carrier," was payable, at all events, on the day named, and negotiable.

Having demonstrated, as we think, that the provisions of the mortgage do not introduce into the note such uncertainty as to time of payment that it is thereby rendered non-negotiable, we shall next consider whether they introduce such uncertainty as to amount as will have that effect. The engagement to pay the taxes and assessments on the land added nothing to the obligation of the maker. That obligation rested upon him independently of any stipulation on the subject. The provisions with reference to waste and insurance did not enlarge his obligation as a maker of the note or increase the amount which he had agreed to pay to the holder of it. All those requirements related to the security which had been executed to make the payment of the note certain and could not be regarded as increasing the amount of the note. 2 Jones on Mortgages, Secs. 1137, 1683; Wilson v. Campbell, 110 Mich. 583.

Clarke v. Hunter.

In Kansas and Utah just such cases as the one here presented have been before their Supreme Courts, and in both States it is held that such a note is non-negotiable, but so far as we are able to learn, they stand alone. They are in conflict with the following well-considered cases: Chicago Equipment Company v. Merchants National Bank, 136 U. S. 268; Carlon v. Knealy, 12 Mees. & W. 139; Ernst v. Steckman, 74 Pa. St. 13; Walker v. Woolen, 54 Ind. 164; Carlton v. Read, 61 Iowa, 166; Wilson v. Campbell, 110 Mich. 550.

Commercial paper has become of late years such a medium of exchange in the business world that there has been a gradual departure by most of the courts from the old restrictions and expressions which counsel for appellee call to their aid. With the exception of the Supreme Court of the United States, there is, perhaps, no court in this country in which the disposition to such departure is more manifest than in the Supreme Court of our own State. Under its decisions neither the provision for an attorney fee in the event of collection by suit, the right in the maker to pay before the date named, nor a power of attorney contained in the note authorizing any attorney of a court of record to confess a judgment upon the note before it is due, will render the instrument non-negotiable.

Aside from a question of negotiability there is another one involved that seems to us of more importance than counsel have seen fit to give it; and that relates to the care exercised by Lucas in ascertaining that the money paid in by him was paid to the proper party. Did Lucas exercise proper precaution in that regard?

Under what excuse or pretext could the maker of the note assume to pay a part of it before maturity, without taking the precaution to see it and have an indorsement of the payment made upon it, or without knowledge that the person to whom he makes payment owns it? It is an elementary rule that the debtor must know at his peril that the person to whom he makes payment has authority to receive it, and that he who is negligent in that regard must bear the loss

of his dereliction rather than such consequence shall be visited upon an innocent person. Whether negotiable or not, the note was not due upon any terms of either note or mortgage when Lucas made the payment, and he had no right to assume that Oliver was still the owner of it. Persons of even slight intelligence knew that when securities of this kind are given to brokers, such as the evidence shows Oliver was, that it is their custom to sell them to others. That is an important part of their business, and persons who desire to make payments on securities which they have executed to them, should exercise some care to ascertain whether they still own them. The letter written by Brinkerhoff and Oliver to Lucas, before the payment was made, would seem to contain sufficient notice to a person of common intelligence and ordinary prudence that some one else owned or controlled the note, for by it he was informed that they had made arrangements for him to pay on the Hunter mortgage, in accordance with their understanding, early in the month. If Oliver owned the note then why were any arrangements necessary? If Lucas had ascertained the truth from Brinkerhoff and Oliver he would have known that Oliver did not own the note. In paying to them then he would thereby constitute them as agents, and the loss incident to their failure to pay to the holder would be his and not that of the holder, of course. If the letter contained enough to put him on inquiry as to who did own the note, and he, without making inquiry, saw fit to pay to them, with equal reason should he bear the loss consequent upon their fraudulent appropriation of the money.

Lucas testified that he paid Brinkerhoff and Oliver \$100 for the privilege of making the payment before maturity, and that he did not know whether they had the note in possession when he made the several payments by check, and took no steps to ascertain whether they were credited upon it. It would seem to follow, when all the evidence is considered, that when he paid Brinkerhoff and Oliver the \$100 he paid it for their services as brokers, to arrange with the owner of the note for a payment of \$3,000 thereon before

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its maturity. Therefore we feel justified in saying that when the entire record is considered, the conclusion is legitimate that Brinkerhoff and Oliver received the \$3,000 as the agents of Lucas.

The judgment should have been for \$3,000 and the interest thereon. As a jury was waived in the court below, we shall render judgment in this court for the amount due at the time of filing this opinion, which we find to be \$3,945. We therefore order judgment to be entered for that amount in favor of appellant and against appellee and the costs of this court. Judgment reversed.

Finding of Facts, to be incorporated in the judgment. We find that at the time appellant purchased the instrument sued on the same was not due; that no part of the principal had ever then been paid; that the amount of \$3,000, remitted by Caleb K. Lucas to Brinkerhoff and Oliver to be applied on the note, was never in fact paid to the holder of the note; that in receiving such remittance Brinkerhoff and Oliver were the agents of Lucas, and that appellant, at the time of receiving the note, had no notice of such remittance. And the court further finds that there is now due appellant upon said note the sum of \$3,945.

83	113
87	445
183	174
184s	81

83	118
s99	281

83	113
103	579

William Metzger and Richard Snell v. Stephen K. Morley.
Same v. Alexander P. Wooldridge.

1. **JUDGMENT—Record Entries, Essentials of, etc.**—The record entries in these cases are memoranda only, from which a judgment may be written by the clerk, but in no proper sense do they contain any of the elements of a final judgment.

2. **RECORD—Clerk's Memoranda.**—The entry, "Judgment on the verdict for \$1,521.09," in no proper sense contains any of the elements of a final judgment.

Appeal, from the Circuit Court of DeWitt County; the Hon. WILLIAM G. COCHRAN, Judge, presiding. Heard in this court at the November term, 1898. Dismissed. Opinion filed June 1, 1899.

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A. E. DEMANGE, attorney for appellants.

MOORE, WARNER & LEMON, attorneys for appellees.

PER CURIAM.

In each of these cases that which, in the record, is contended by appellants to be the final judgment, is in the following words and figures: "Judgment on the verdict for \$1,521.09." Motions have been made in this court by appellees to dismiss the appeals taken by the appellants from the judgments, so called; which we have quoted from the record for the reason, as chiefly urged, that the words quoted in no proper sense constitute a judgment. Against this position it is argued that the judgments are defective merely, and for such reason should be reversed. If appellees in this court were contending the words quoted constituted judgments the position of appellant would doubtless be well taken, and in such case they would be so treated and reversed, but such is not the issue made by these motions, the point presented being whether such a record entry by the clerk contains any of the essential qualities of a judgment. The authorities are to the effect that such record entries are memoranda only, from which a judgment may be written by the clerk, but in no proper sense contain any of the elements of a final judgment. (Fitzsimmons v. Munch, 74 Ill. App. 259, and cases cited.) No final judgments appearing in the records in these cases, there were nothing to appeal from, and the appeals will therefore be dismissed.

The People, etc., v. John S. Fisher.

1. HARMLESS ERROR—*Is Not Sufficient to Reverse.*—Where no harm results to the prosecution by the court sustaining objections, it is not reversible error.

2. DOMESTIC REMEDIES — *Iodine and Quinine.* — In determining whether iodine and quinine, as sold by pharmacists, are domestic

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remedies under the pharmacy law, a jury is not required to close their eyes against their own experience in the use of such drugs.

3. **SAME—Definition.**—Domestic remedies, within the meaning of the statute, are not confined to harmless concoctions of teas and herbs, which those unlearned in medical and scientific lore can prepare at home, and may include drugs requiring scientific knowledge and apparatus to prepare. A drug, although prepared by skilled chemists and scientific apparatus, may come into such common use and be so well understood in its effects, by people without medical knowledge, as to make it a domestic remedy, and the mere fact that it is an irritant poison will not take it out of the pale of “domestic remedies.”

Prosecution, under the pharmacy law. Trial in the Circuit Court of Sangamon County; the Hon. ROBERT B. SHIRLEY, Judge, presiding. Verdict and judgment for defendant; appeal by the people. Heard in this court at the November term, 1898. Affirmed. Opinion filed June 8, 1899.

M. L. NEWELL, attorney for plaintiff in error; **E. S. SMITH, JAMES A. GRAHAM and CHARLES E. SELBY**, of counsel.

CONKLING & GROUT, attorneys for defendant in error.

MR. JUSTICE HARKER delivered the opinion of the court.

This was a prosecution against the defendant in error to recover by action of debt the penalty provided by law for selling drugs in violation of an act to regulate the practice of pharmacy in the State of Illinois.

The complaint on which the prosecution was instituted was filed before a justice of the peace and charged the defendant in error with selling one dime's worth of tincture of iodine and one dime's worth of quinine without being a registered pharmacist, as required by the act. A trial before the justice resulting in an acquittal of the defendant, an appeal was prosecuted to the Circuit Court, where the case was tried by a jury with like result. A reversal is urged upon the grounds that the court rejected proper evidence offered by the people, that the jury were improperly instructed, and that the verdict is contrary to the law and the evidence.

The evidence shows that Fisher has for many years owned and carried on a drug store in the city of Springfield; that

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he paid for and held a certificate as a registered pharmacist up to December, 1893, since which time he has refused to renew his certificate. While the secretary of the Board of Pharmacy, Frank Fleury, was on the witness stand he was asked by counsel for the people what conversation had occurred between him and Fisher with reference to Fisher's renewing his certificate, and what had been done by Fisher with respect to renewing. The court sustained an objection to the inquiry upon the ground that it was immaterial. Conceding the point made by counsel for the plaintiffs in error, that the testimony was admissible as tending to prove one of the issues involved, no harm resulted to the prosecution by the court sustaining objections to the questions, for the reason that it abundantly appears in the record that Fisher had refused to renew his certificate and, at the time of the sale, was not authorized to sell drugs as a registered pharmacist. Indeed, there was no contention over that issue in the court below, and the frictional question submitted to the jury was whether the drugs sold were domestic remedies within the meaning of the statute.

The instruction complained of reads as follows:

"Although the jury may believe from the evidence that the defendant sold iodine and quinine, yet if they further believe from the evidence that they are domestic remedies, then the defendant is not liable for such sales."

The sale of "domestic remedies" is exempted from the statutory provisions under which Fisher was being prosecuted. It is objected to this instruction that there is no evidence on which to base it; the only evidence in the record being that iodine is an irritant poison, and that quinine is a drug prepared by manufacturing chemists. The same objection is made to the modification of an instruction offered by the plaintiffs in error. It is also urged that as the Supreme Court has held inferentially in the case of Cook v. The People, 125 Ill. 278, that quinine is not a domestic remedy, it was error to submit to the jury, as the instructions did, the determination of whether that drug is a domestic remedy. The logic of that contention is that quinine, as a matter of law, is a drug that can be legally sold only by a registered

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pharmacist and is not a domestic remedy. All that was said by the Supreme Court in *Cook v. The People*, *supra*, was that the court thought that "the jury were fully warranted in finding, from the evidence, that quinine was not one of the usual domestic remedies referred to in said proviso." We are clearly of the opinion that in prosecutions under this act the determination of whether the drug sold is a domestic remedy is a question of fact for the jury. Nor do we think the court erred in so instructing, because the only testimony heard upon this point was that of Fleury, who stated that iodine was an irritant poison, not in common use in the household, and that quinine was a drug prepared by manufacturing chemists. Because of his testimony the jury were not required to close their eyes against their own experience in the use of such drugs.

We can not agree with counsel for the plaintiffs in error that domestic remedies, within the meaning of the statute, are confined to "harmless concoctions of teas and herbs," which those unlearned in medical and scientific lore can prepare at home, and do not include drugs requiring scientific knowledge and apparatus to prepare. We think a drug, although prepared by skilled chemists and scientific apparatus, may come into such common use and be so well understood in its effects by people without medical knowledge as to make it a domestic remedy.

For instance, there are portions of territory lying within what is known as the Mississippi Valley where "chills and fever" are of such frequent occurrence (and recurrence) that quinine, in certain seasons of the year, is almost as common an article of household use as the ordinary necessities of life, and the good housewife, when she doses the children from the family bottle understands its effect about as well as the licensed pharmacist. It is a matter of common experience that iodine is frequently used in the household as an antidote for wild-ivy poison, ringworm and other skin affections. The mere fact that it is an irritant poison would not bring it out of the pale of "domestic remedies."

We see no error in the record that would justify us in reversing the judgment. Judgment affirmed.

Chicago & E. I. R. R. Co. v. William H. Garner.

1. INSTRUCTIONS—*Where the Evidence is Conflicting.*—Where the evidence is conflicting on all the vital questions in the case, and raises a doubt as to whether there should be a recovery, the jury should be assisted in their investigation by clear, accurate and perspicuous instructions, to enable them to arrive at a just conclusion on the disputed facts.

2. SAME—*A General Rule.*—The general rule is, that if the instructions are objectionable, and their natural effect is to mislead the jury, where the facts are controverted, the verdict will be set aside, and the cause submitted to another jury, with proper instructions.

3. INSURANCE—*Waiver of Certain Proofs by Refusal to Pay.*—Where an accident insurance policy provides that the insured shall, in case of an accidental injury, furnish a certificate from his surgeon covering the period of his disability, showing that he was disabled, and that such disability was in consequence of the injury sustained by him, the presentation of such certificate is waived, by the company notifying the insured that it will not pay him anything on the policy, for reasons other than the failure to furnish such certificate.

4. ATTORNEYS—*Improper Remarks in Argument.*—The following remarks by counsel for plaintiff, to wit: “The plaintiff is entitled to twenty-five dollars a month for seven months. * * * For what reason will you refuse it? Does the evidence show he is a fraud? It does not. No one says so, except counsel for defendant, and he is hired up here to say that every man that comes before him is a fraud—that there must be fraud. Kill and cripple and ruin them, and send them to the poorhouse, for the county to keep them. And he comes into court and says they are a fraud. Well, I won’t put that in. I withdraw the killing part. He is trying to cobweb things to go in, to trouble men, not to do justice, but to heap a wrong against a fellow-citizen in the interests of his clients, because, forsooth, they are rich and powerful, and can fight and pay”—were held, to be well calculated to arouse the passion and prejudice of, and wrongfully influence the jury against the defendant in a case where the evidence is conflicting and the case close.

Assumpsit, on an accident insurance policy. Trial in the Circuit Court of Vermilion County; on appeal from a justice of the peace; the Hon. FERDINAND BOOKWALTER, Judge, presiding. Verdict and judgment for plaintiff; appeal by defendant. Heard in this court at the November term, 1898. Reversed and remanded. Opinion filed June 8, 1899.

H. M. STEELY, attorney for appellant; W. H. LYFORD, of counsel.

THIRD DISTRICT—NOVEMBER TERM, 1898. 119

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MABIN & CLARK, attorneys for appellee.

MR. PRESIDING JUSTICE BURROUGHS delivered the opinion of the court.

On February 28, 1898, the appellee commenced this suit against the appellant before a justice of the peace in Vermilion county, and by appeal it was taken to the Circuit Court of that county, and tried by a jury, resulting in a verdict and judgment in favor of the appellee for \$166.94. The appellant brings the case to this court by appeal, and urges us to reverse the judgment, on the grounds that the court admitted improper evidence against it; that the verdict is contrary to the law and the evidence; that the court improperly modified one of its instructions, and, as modified, gave it to the jury; and that counsel for the appellee, in his closing argument to the jury, made improper remarks.

The suit was on a demand for seven months' indemnity, commencing August 1, 1897, and ending February 28, 1898, under a contract of insurance consisting of an application made by the appellee to the appellant August 6, 1896, as follows:

"I hereby apply to the Chicago & Eastern Illinois Railroad Company for an accident insurance policy, and request said company to advance to me the premium herein, as herein specified. * * * I hereby authorize and direct the paymaster of said company to deduct from my pay each month, so long as I may remain in the service of said company, * * * one per cent of my usual monthly wages. For the purpose of such insurance, I hereby agree that \$50 shall be considered to be my usual monthly wages, and shall be the basis of computation for the premiums and benefits to be paid under this policy.

(Signed) WILLIAM H. GARNER."

And a policy issued to him as follows:

"No. 8303. \$50.00.

This is to certify that William H. Garner, employed by the Chicago & Eastern Illinois Railroad Company as fireman, residing at Danville, is insured against accident resulting in bodily injury or death.

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By the terms of this insurance such insured will receive through the paymaster of the Chicago & Eastern Illinois Railroad Company, in case he shall sustain accidental injury at any time after the date hereof, and while he remains in the employ of said company, the following benefits:

In case of accidental injury not resulting in death, one-half of his usual wages during such time (not exceeding fifty weeks), as he shall be totally or necessarily disabled by reason of such injury; the total in no event to exceed the sum of \$1,000. Such benefit shall not accrue, or be payable, except upon the presentation of certificate of attending surgeon as to consequent disability.

For the purpose of this insurance it is hereby agreed that \$50 shall be considered to be the usual wages of said insured, and shall be the basis for the computation of premiums and benefits to be paid hereunder.

Such benefits shall not accrue except for accidental injury sustained by said insured while he is actually engaged in the service of said company.

Dated at Chicago this sixth day of August, 1896.
(Signed) CHICAGO & EASTERN ILLINOIS RAILROAD COMPANY.

By C. W. HILLARD,
2d Vice-President and Treasurer."

The evidence shows that the appellee commenced work as a locomotive fireman for the appellant on August 6, 1896, and continued in such employment until July 21, 1897; that he made the foregoing application to the appellant and received from it the above policy sued on when he entered into such employment. On July 31, 1897, Dr. R. W. Gillett gave appellee a certificate, as follows:

"I hereby certify that W. H. Garner, fireman, has been under my care for injuries which were the result of an accident near Cayuga; that he has been totally disabled from his usual employment by reason of said injury from the 21st day of July, 1897, to the present time, and that such employe is not yet able to resume work.

(Signed) R. W. GILLETT, M. D.
August 1, 1897. Surgeon at Danville."

Upon which the appellant paid him the sum of \$8.06 as indemnity for disability in the month of July, 1897, under the provisions of the policy. Dr. Gillett refused to give appellee any further certificate, and on October 12, 1897,

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H. F. Jones, superintendent of the insurance department, wrote to the appellee a letter, as follows:

“DEAR SIR: After a thorough investigation of your case, I beg to advise that I will have to decline to pay you any amount whatever on account of insurance.

(Signed) H. F. JONES.”

The appellee testified that on July 21, 1897, he fell from a locomotive of the appellant, upon which he was then fireman, when it was pulling a freight train near Cayuga, Indiana, from which he lost consciousness until he was in the hospital at Danville, when he felt great pain all over, and since that time he has been unable to work, or even walk without the aid of crutches; that he had a talk with Mr. H. F. Jones, claim agent of the appellant, at Mrs. Baker’s house, in Danville, on August 2, 1897, in which he said “I might go to Kentucky, where I formerly lived, if I desired to, and he would furnish me with a blank; and for me to be examined there by a doctor and the doctor send in a report, and he would send my checks for insurance there as long as I stayed.” I did so, and wrote Mr. Jones and got no answer. I wrote to Mr. Broughton, superintendent or general manager of the appellant, and he replied September 20, 1897, as follows:

“I have your letter and have referred same to our claim agent;” and that on September 21, 1897, H. F. Jones, superintendent of insurance of the appellant, wrote me a letter from Chicago, Illinois, as follows:

“I have your letters in relation to insurance matter, and beg to advise that I wrote your doctor concerning your disability, and asked him to be kind enough to give me a complete reply. He has not done so, and you better see him and have him write me fully as to all I asked him. Upon receipt of his reply, I will take the matter up immediately.” (Which letter was put in evidence.) He further testified that the appellant, each month while he worked for it, took one per cent out of his wages to pay for this insurance.

Dr. W. A. Cochran testified that he was the county physician of Vermilion county, lived at Danville, and had practiced medicine since 1873; knew the appellee and examined

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him in January, 1898; found he had received an injury about the hips which affected the sciatic nerve; he had also received an injury to one of his shoulders, but it was not permanent; found considerable swelling about his left knee joint, which was an inch and a quarter larger around than the other; found some loss of sensation of the skin about the hip and left leg, with some loss of muscular power and traces of paralysis.

Dr. S. W. Jones testified that he was a physician and surgeon in practice for twenty-two years, and on May 27, 1898, he examined the appellee at the request of his attorneys; found some tenderness over the region of the fourth and fifth lumbar vertebrae and in the region of the sciatic nerve; found his left knee was an inch and a quarter larger in circumference than the other; his left leg was paralyzed and he did not have good use of it. I found no evidences of bruises or lacerations.

Dr. R. W. Gillett testified that he lived at Danville, Ill., was a regular graduate of medicine and surgery and had been in regular practice for twenty-seven or twenty-eight years; that he was called to see and treat appellee on July 21, 1897; first saw him at the depot in Danville, and then he was taken to St. Elizabeth's Hospital, where I took off all his clothing and made an examination of him all over, and frequently and very carefully examined him thereafter; I treated him some seventeen or eighteen days; he complained of pain in every part of his body, but I was unable to find any indication of or cause for it in the least. There were no bruises, abrasions, swellings, scratches or indications of injuries of any kind on any part of his person; he could use all his limbs, muscles, etc., and they acted normal. Saw him examined by Dr. H. W. Morehouse, medical superintendent of the Wabash Railroad Company, who made a very thorough examination of him at the hospital when naked; he used an æsthesiometer, an instrument used by surgeons to determine the area of sensibility, and he was unable to find anything abnormal in his condition whatever. That he (Gillett) saw the appellee a few days after he was in the

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hospital walking around the room and he could put his limbs in any position, stand on his feet or sit up in bed; that had he been paralyzed he could not have done this; and that he gave no signs of paralysis whatever. As a medical man, I would say I don't believe he had sustained any injury at all, and if there was any, it was comparatively slight. I did give him the certificate of injury and consequent disability for the few days in July, 1897, that he was in bed, because he complained of such pain, and I gave him the benefit of the doubt, but later on, after seeing more of him, becoming satisfied that he was shamming, I refused to give him any further certificate.

H. F. Jones testified: I am at present in charge of the insurance department of the appellant; became connected with that department on August 11, 1897; previous to that time I was not in any way connected therewith, but was the law and claim agent of the appellant to investigate personal injury claims. I recollect meeting the appellee August 2, 1897, at a cottage in Danville, and had a conversation with him in the presence of Harvey Preston, the engineer. There was nothing said in that conversation by Mr. Garner in reference to his insurance, but he wanted me to get him transportation to Kentucky, and I told him I would try and get it for him from the operating department. I never told him I would send him checks for his insurance to Kentucky, and had no right to.

This was all the evidence, and it being so very conflicting on all the vital questions in the case, raised a serious doubt as to whether or not the appellee was injured and disabled as claimed by him, to an extent sufficient to render the appellant liable to him for the indemnity he sued for, so that the jury should have been assisted in the investigation of the evidence by clear, accurate and perspicuous instructions to enable them to arrive at a just conclusion on the disputed facts. Illinois Central R. R. Co. v. Hammer, 72 Ill. 347; and Volk et al. v. Roche, 70 Ill. 297.

The appellant complains that the court improperly modified its fourth instruction, and as modified made it confus-

ing and misleading. The instruction requested is as follows:

"4. The court instructs the jury that in this case, before the plaintiff can recover insurance from defendant company under his contract in question, he must first show and prove by a preponderance of the evidence that he was injured while in the employ of defendant and in the line of his duty, and that in consequence of such injury he was disabled and incapacitated from performing his usual duties in the line of his employment, and that he has presented to defendant company a certificate or certificates from his surgeon, covering the period of his disability, showing that he was disabled and that such disability was in consequence of the injury sustained by him; that to entitle plaintiff to recover he must first show a contract of insurance by defendant; second, that he was injured while in the employ of defendant, and in the line of his duty, during the continuance of such contract; third, that such injury disabled and incapacitated him from performing his duty as a locomotive fireman; and fourth, that he has presented to defendant company a certificate or certificates from his surgeon covering the period for which insurance is claimed by him, showing his disability, and that it was occasioned by his injury; that all these must concur and be proved by plaintiff by a preponderance of the evidence before he can recover."

Which the court modified by adding thereto the following:

"But the presentation of such physician's or surgeon's certificate would not be necessary if the defendant company notified plaintiff that it would not pay him anything upon the policy for reasons other than the non-presentation to the company of such certificate," and then gave it.

In the form requested the court properly refused the instruction, because the letter, notifying the appellee that the appellant would not pay him any amount on the policy, did waive the production of the attending surgeon's certificate of injury and consequent disability, but it did not, nor did any other evidence in the record show that the appellant had waived the proof of such injury and disability, or that the appellant had notified the appellee of any reasons other than the non-production of such certificate why it declined to pay him; and yet the court, by this addition, told

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the jury the presentation of such certificate was unnecessary if the appellant had notified the appellee it would not pay him for reasons other than the non-production of such certificate. And when the instruction, with the modification added, is read, it is confusing and quite unintelligible on the question of waiver to the untrained minds of the jurors, and was well calculated to mislead and confuse them as to what must and what need not be proven by the appellee to entitle him to a verdict.

The vital facts in the case were in doubt on account of the sharp conflict in the evidence, and the modified instruction was inaccurate, uncertain and confusing as to what facts need and what need not be proven to entitle the appellee to a verdict. The modification also referred to matters not in evidence, and therefore it was reversible error for the court to give it.

The general rule is that if the instructions are objectionable, and their natural effect would be to mislead the jury where the facts are controverted, the verdict ought to be set aside and the case submitted to another jury with proper directions. See Adams v. Smith, 58 Ill. 418; and Cushman v. Cogswell, 86 Ill. 62.

The remarks complained of, which counsel for the appellee made in his closing argument to the jury, are as follows:

“He (appellee) is entitled to twenty-five dollars a month for seven months. * * * For what reason will you refuse it? Does the evidence show he is a fraud? It does not. No one says so except Steely (counsel for appellant). He is hired up here to say that every man that comes before him is a fraud—that there must be fraud. Kill and cripple and ruin them, and send them to the poorhouse for the county to keep them. (Objected to by the defendant.) And he comes into court and says they are a fraud. Well, I won’t put that in. I withdraw the killing part. He is trying to cobweb things to go in, to trouble men, not to do justice but to heap a wrong against a fellow-citizen in the interests of his clients, because, forsooth, they are rich and powerful and can fight and pay.”

These remarks, we think, were not justified by anything appearing in the record, and we can see they were well cal-

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culated to arouse the passion and prejudice of, and probably did, wrongfully influence the jury against the appellant, in a case where the evidence was very conflicting on all vital questions in the case; and while there are cogent reasons why appellate courts should be careful and critical in recognizing alleged improper statements of counsel in argument to a jury, as affording grounds for reversal, yet it seems to us to be consistent with the ordinary principles upon which justice is administered, that the remarks of counsel complained of in this case were material; and we can see from an examination of the evidence that they were very likely to, and probably did, wrongfully influence the jury in returning a verdict against the appellant, which they otherwise, under the conflicting evidence might not have done; and for that reason we think it is our duty to reverse the judgment, so that a new trial may be had, where the conflicting evidence may be considered by a jury not subjected to such improper remarks (see Chase v. City of Chicago, 20 Ill. App. 274), and where the jury may receive instructions from the court that are clear and not misleading or confusing.

As to the rulings of the court in admitting improper evidence, we are unable to find any prejudicial error in that respect, but on account of the erroneous modified instruction and the improper remarks of counsel, we reverse the judgment of the Circuit Court, and remand the case to that court for a new trial. Reversed and remanded.

Dixon L. Withers v. Harrison Brunton.

1. JUSTICES OF THE PEACE—*No Power to Ante date a Judgment.*—A justice of the peace can not date a judgment at a time prior to the day on which the same was actually rendered, and by doing so deprive a party of the full twenty days allowed by law in which to appeal.

2. SAME—*Rights Not to Be Taken Away by His Mistakes.*—The rights of persons conferred by a statute can not be taken away or

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abridged by the mistake or inadvertence of a justice of the peace in giving to a judgment a date different from the time it was in fact rendered.

3. CERTIORARI—*When It Lies.*—Where a party has used all the diligence the law demands, by attempting to prosecute his appeal within twenty days from the time of the rendition of the judgment, but, by reason of the justice who rendered the judgment, giving to it an improper date, is prevented from perfecting an appeal in an ordinary way, a writ of certiorari is the proper remedy.

Certiorari.—Appeal from an order quashing the writ entered by the Circuit Court of McLean County; the Hon. COLOSTIN D. MYERS, Judge, presiding. Heard in this court at the November term, 1898. Reversed and remanded. Opinion filed June 8, 1899.

F. R. HENDERSON and JOHN E. POLLOCK, counsel for appellant.

The petition fully states the case and the only authority we wish to cite is Gibson v. Ackerman, 70 Ill. App. 399.

PEIRCE & PEIRCE, attorneys for appellee.

MR. JUSTICE WRIGHT delivered the opinion of the court.

Appellant has appealed to this court from the judgment of the Circuit Court quashing the writ of certiorari which had been previously ordered and issued upon petition presented by him.

By the petition it is made to appear that appellee sued appellant before a justice of the peace for \$42.79, the summons having been made returnable December 23, 1896, at one o'clock; previous to this appellant had deposited with the justice of the peace, as a tender in full of appellee's demand, the sum of \$35, which he claimed is all that he owed, and that such sum still remains with the justice of the peace as a tender. At the time the summons was returnable the parties appeared and a trial was had of the case before the justice of the peace, who, without giving judgment took the cause under advisement, and continued it until December 31, 1896, at two o'clock, at which time judgment was rendered against appellant for \$42.79. Within twenty days after the latter date, but more than

that time after the former date, appellant applied to the justice of the peace to appeal from such judgment to the Circuit Court, and for the first time learned, and which was the fact, that the judgment had been rendered as of December 23, 1896, and for such reason was unable to take the appeal in the ordinary way. It further appears, as we think sufficiently, that appellant had a defense to the merits, and which he presented by reasonable effort before the justice of the peace, to the excess of appellee's demand above §35.

By Section 1, Article 10, Chapter 79, Starr & Curtis, the party against whom a judgment is rendered is given twenty days from the rendition of the judgment in which to file an appeal bond. The justice of the peace could and did not, by dating the judgment at a time prior to the day the same was actually rendered, thereby deprive appellant of full twenty days from the rendition of the same, allowed by law, in which to file his appeal bond. The rights of persons conferred by statute can not be taken away or abridged by the mistake or inadvertence of the justice of the peace in giving to the judgment a date different from the time it was in fact rendered.

It is insisted by counsel for appellee that appellant was guilty of negligence in not prosecuting his appeal within the twenty days after the judgment was in fact rendered. We can not agree with this insistence. We think appellant used all the diligence the law demanded by attempting to prosecute his appeal within twenty days from the time of the rendition of the judgment, but by reason of a mistake or inadvertence of the justice of the peace, in giving the judgment an improper date, he was prevented from perfecting the appeal in the ordinary way.

It was error for the court to quash the writ of certiorari, and for this its judgment will be reversed and the cause remanded.

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1. **PROMISSORY NOTES—Defined.**—A promissory note is defined to be “a written promise by one person to pay another person therein named, or order, a fixed sum of money, at all events and at a time specified therein, or at a time which must certainly arrive.”

2. **SAME—What Does Not Destroy Its Negotiability.**—An agreement added to a promissory note authorizing the legal holder to have judgment by confession at any time thereafter, for the stipulated damages and attorney fees, does not render the amount the maker must pay or the time of its payment so uncertain as to destroy the negotiability of the note, but simply gives the holder an additional remedy to enforce the payment, and a remedy which facilitates rather than encumbers its circulation.

3. **SAME—Superadded Stipulations Authorizing Confession of Judgment.**—Stipulations authorizing confession of judgment for the sum promised to be paid, with an added sum for collection and attorney's fees, do not destroy the negotiability of a promissory note.

4. **SAME—Fraud and Circumvention.**—To enable the maker of a promissory note to be protected by the provisions of Sec. 14, Chap. 98, R. S., the execution of the note must be procured by some fraudulent practice or device.

5. **SAME—Fraud or Deception in the Consideration.**—Fraud or deception in the consideration, or the wrongful putting the note in circulation, will not defeat a recovery thereon by a *bona fide* purchaser for value before maturity.

6. **SAME—Indorsements Without Date.**—Where promissory notes are put in evidence on which are assignments without date, the legal effect is to presumptively establish that the plaintiff is the *bona fide* owner of the notes by purchase for value, without notice, in due course of business before maturity, and entitled to recover the amount therein specified to be paid.

7. **NOTICE—Publications in Newspapers.**—Notices published in newspapers are not binding upon a party purchasing notes, unless it is shown to have been brought to his knowledge before he purchased.

Judgment by Confession.—Trial of issues of fact, submitted on motion of defendant in the Circuit Court of Logan County; the Hon. GEORGE W. PATTON, Judge, presiding. Verdict and judgment for plaintiff; appeal by defendant. Heard in this court at the November term, 1898. Affirmed. Opinion filed June 3, 1899.

A. L. ANDERSON and BEACH & HODNETT, attorneys for appellant.

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Certainty in the time of payment is one of the essential elements of a negotiable instrument, and the notes sued on in this case, being due at the option of the holder immediately after their execution and delivery, were not negotiable instruments in the sense of cutting off defenses that might have been made against their collection if they were sued on by the payee in said notes. Dorsey v. Wolff, 142 Ill. 589; Richards v. Barlow (Mass.), 6 N. E. Rep. 68; First National Bank v. Bynum, 84 N. C. 24, 37 Am. St. Rep. 604; Salisbury v. Stewart, 15 Utah, 308, 62 Am. St. Rep. 934; Oppenheimer v. Bank, 97 Tenn. 19, 56 Am. St. Rep. 778; Stapleton v. Louisville Bkg. Co., 95 Ga. 802; Overton v. Tyler, 3 Penn. St. 346; S. C. 45 Am. Dec. 545; Brooks v. Hargreaves, 21 Mich. 254; 1 Rand. on Com. Paper, Sec. 110; Hubbard v. Mosley, 11 Gray, 170; Way v. Smith, 111 Mass. 525.

Assignee of chose in action takes subject to all defenses that could be made against the paper in the hands of assignor. Am. and Eng. Ency. of Law, Vol. 21, p. 1079 (2d Ed.); McCormick v. Buehler, 67 Ill. App. 75; McAuliff, Adm'r, v. Reuter, 166 Ill. 491.

Where a note has been obtained by fraud the assignee can only recover what he paid for the note in any event. Daniel on Neg. Inst., Sec. 758; Oppenheimer v. Bank, 97 Tenn. 19, 56 Am. St. Rep. 778; Petty v. Hannum, 2 Humph. 102; Holeman v. Hobson, 8 Humph. (Tenn.) 127; Green v. Stuart, 7 Baxt. (Tenn.) 422; Todd v. Shelbourne, 8 Hun, 510.

BLINN & HARRIS, attorneys for appellee.

The assignment of a negotiable instrument by an assignment not dated carries with it the legal presumption that it was assigned before maturity for a valuable consideration, and was a *bona fide* transaction. Farber v. The National Forge & Iron Co., 50 Ill. App. 507; Burnap v. Cook, 32 Ill. 168; Depuy v. Schuyler, 45 Ill. 306; Mulford v. Shepard, 1 Scam. 583; Best v. Bank, 76 Ill. 608; Mobley v. Ryan, 14 Ill. 51; Cisne v. Chidester, 85 Ill. 524; 1 Randolph on Commercial Paper, 342.

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A negotiable instrument under the laws of Illinois is one where there is a written promise to pay a certain person or his order a fixed sum of money at a fixed time, or a time certain to arrive. Secs. 3 and 4, Chapter 98, R. S.; Canadian Bank v. McCrea, 106 Ill. 293; Dorsey v. Wolff, 142 Ill. 593; Lowe v. Bliss, 24 Ill. 168; Chicago Equip. Co. v. Merchants' Bank, 136 U. S. 268; 2 Am. and Eng. Enc. of Law, 314.

A clause in the power of attorney attached to the note, providing that judgment might be taken by confession at any time after date, whether due by lapse of time or not, was held to be a promissory note in Adam v. Arnold, 86 Ill. 185; Thomas v. Mueller, 106 Ill. 36.

The provision in a power of attorney that judgment may be taken by confession at any time after date, is a remedy given as a part of the contract to take judgment before the note is due at the election of the holder. Boley v. The Lake St. El. R. R. Co., 64 Ill. App. 310; Daniel on Negotiable Instruments, Vol. 1., Sec. 1.

A note that is a negotiable instrument, assigned before maturity for a valuable consideration in good faith, the holder is entitled to recover the full amount of the note and interest and it is no concern of the maker what assignee paid for the note. Vol. 1 (3d Ed.), Daniel on Negotiable Instruments, page 704; Daniels v. Wilson, 21 Minn. 530; Cromwell v. County of Sac, 96 U. S. 51; Vinton v. Peck, 14 Mich. 296; Lay v. Wissman, 36 Ia. 305; Murray v. Beckwith, 81 Ill. 44; Shreeves v. Allen, 79 Ill. 553; Comstock v. Hannah, 76 Ill. 530; Beemis v. Horner, 165 Ill. 352.

Gross negligence upon the part of the indorsee of a negotiable instrument, or the suspicion or knowledge of circumstances that might excite suspicion upon the part of a prudent man, will not affect the note in the hands of indorsee unless bad faith is shown. Beemis v. Horner, 165 Ill. 352; Murray v. Beckwith, 81 Ill. 43; Shreeves v. Allen, 79 Ill. 553.

MR. PRESIDING JUSTICE BURROUGHS delivered the opinion of the court.

On January 17, 1898, the appellee obtained in the Circuit

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Court of Logan County, in term time, in an action of assumpsit, a judgment by confession against the appellant, for the sum of \$1,603, upon two written instruments and the indorsements thereon, one of which instruments is in words and figures as follows:

“\$700.00.

LINCOLN, ILL., Jan. 6th, 1897.

One year after date, for value received, I promise to pay to the order of John Bushell, seven hundred dollars, at the German American National Bank of Lincoln, Illinois, with interest at seven per cent. per annum from date. And if judgment be confessed under the following power of attorney, which is made a part of this note, the attorney's fee therein provided for to be entered up as a part of the judgment.

Now, therefore, in consideration of the premises we do hereby make, constitute and appoint any attorney of any court of record to be a true and lawful attorney, irrevocably, for us and in our name, place and stead, to appear in any court of record in term time or vacation, at any time hereafter, whether this note be due by lapse of time or not, in any of the States or Territories of the United States, to waive the service of process and confess a judgment in favor of the holder of this note for the above sum and interest thereon to the day of the entry of said judgment, together with costs and damages and ten dollars and five per cent. on amount then due as attorney's fees; and also to file a cognovit for the amount thereof with an agreement therein, releasing all errors that may intervene in entering up said judgment, or in the issuing of execution thereon; and that no writ of error or appeal shall be prosecuted upon the judgment entered by virtue hereof, nor any bill in equity filed to interfere in any manner with the operation of said judgment and to release all errors that may intervene in entering up said judgment, or issuing any execution thereon, and also to consent to immediate execution on said judgment hereby ratifying and confirming all the said attorney may do by virtue hereof.

Witness our hands and seals this 6th day of January, 1897.

(Signed) H. L. HUMPHREYS.
Wm. GEHLBACH.”

This writing is indorsed:

“Pay to the order of H. C. Maltby.

(Signed) JOHN BUSHELL.”

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"Pay to the order of the Carlinville National Bank of Carlinville, Ill.

(Signed) H. C. MALTBY."

The other instrument bears the same date and in all respects is like the first, and has on the back thereof like indorsements.

On April 9, 1898, on motion of the appellant the court opened the judgment to let in any defense he had to the suit and stayed the execution (which had been issued on the judgment) until the further order of the court.

The declaration contained but one count, drawn on the two written instruments and the indorsements thereon, treating them as the promissory notes of appellant that had been assigned by the payee named therein to H. C. Maltby, and by him to the appellee.

The appellant filed a plea of general issue and also gave notice that he would interpose as a defense that the two writings sued on had been given by him to said Bushell without any consideration whatever; and that Bushell with intent to swindle and defraud the appellant, had by fraudulent devices and arguments induced him to sign the two writings and give them to him for the purpose of buying for appellant a saloon in Lincoln, Ill., from one Ben Sigg; and that appellant had signed and delivered the two writings to Bushell for that purpose and none other; that Bushell did not purchase the saloon for appellant but turned the writings over to A. C. Maltby, an accomplice of his, who had full notice, before he received them, that they had been given without consideration and were fraudulently obtained as aforesaid; that Maltby, after getting possession thereof, well knowing he could not collect the money thereon in his own name, pretended to assign them to the appellee as its property, but in fact assigned them only for the purpose of collection; that the appellee is trying to collect the money on the two writings from the appellant in this suit for Maltby, and is not a *bona fide* purchaser thereof for value before maturity, but on the contrary, it received them with full knowledge that they were obtained as aforesaid.

On May 31, 1896, the case was tried before a jury, and at

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the close of all the evidence, on motion of the appellee, the court excluded from the jury all the evidence presented by the appellant and instructed them to find a verdict for the appellee, which being done, the court reinstated the former judgment and execution. The appellant brings the case to this court by appeal and urges us to reverse the judgment on the ground that the court improperly directed the verdict, which is contrary to the law and the evidence.

The claim made by counsel for appellant is that the two writings sued on are not to be regarded as promissory notes, to be protected in the hands of *bona fide* holders for value before maturity, according to the rules of general mercantile law, as applicable to negotiable instruments, but are nothing more than simple contracts, subject, in the hands of transferees, to such equities and defenses as would be available between the original parties; while counsel for appellee insists that the two writings are negotiable promissory notes, and that the evidence shows the appellee is a *bona fide* purchaser thereof before maturity for value, without notice of any defect in the consideration or otherwise, and is therefore entitled, as against the appellant, the maker, to the judgment he procured.

The writings sued on are clearly promissory notes and subject to the rules of mercantile law applicable to negotiable instruments, unless the provision in each, that the holder thereof may procure a confession of judgment thereon at any time after their date for the amount of money thereon agreed to be paid, renders the time of payment or the amount to be paid uncertain. In Dorsey v. Wolff, 142 Ill. 589, the court defines a promissory note to be "a written promise by one person to pay to another person therein named, or order, a fixed sum of money, at all events, and at a time specified therein, or at a time which must certainly arrive (Lowe v. Bliss, 24 Ill. 168; Chicago Ry. Equip. Co. v. Merchant's Bank, 136 U. S. 268; Story on Prom. Notes, p. 2; 3 Kent's Com. 74; 2 Am. & Eng. Ency. of Law, p. 314)," and says, "A note is none the less negotiable because it is made payable on or before a named date" (Chicago

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Ry. Equip. Co. v. Merchant's Bank, *supra*; Cisne v. Chidester, 82 Ill. 523; Ernst v. Steckman, 74 Penn. St. 13); and held that an agreement in the note—in that case as follows: “And if not paid when due and suit is brought thereon, then we promise to pay ten per cent on the amount due thereon in addition as an attorney's fee, and to be recovered as a part of this note, or by separate suit”—did not render the note non-negotiable, for two reasons: first, because “the promise to pay the attorney's fee is a promise to do something after the note matures. It does not affect the character of the note before, or up to the time of its maturity, either as to certainty in the amount to be paid, or fixedness in the date of payment, or definiteness in the description of the person to whom the payment is to be made. The stipulation or promise as to the attorney's fee, can not therefore affect the negotiability of the note because the negotiability of a promissory note is, for all practical purposes, at an end when it matures.” (See page 594 of the Opinion.) And second, because “the additional remedy relates rather to the remedy upon the note, if a legal remedy be pursued, than to the sum which the maker is bound to pay; and it is not different in its character from a cognovit, which, when attached to a promissory note, does not destroy its negotiability.” Daniel on Neg. Ins. (4th Ed.), Secs. 62, 62a.” See page 595 of the Opinion.

Applying the above definition and reasoning to the writings sued on in the case at bar, we think the \$700 and interest thereon, at seven per cent per annum from date mentioned in the note part proper of each, is promised to be paid to the order of John Bushell by Wm. Gehlbach, one year after date, which is a promise certain as to the sum to be paid, the time when, the person to whom and by whom it is to be paid, and exactly conforms to the requirements of a negotiable promissory note, as defined in Dorsey v. Wolff, *supra*, and in Haughton v. Francis, *supra*.

Then reading into these notes, respectively, those parts thereof, as follows: “And if judgment be confessed under the following power of attorney, which is made a part of

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this note, the attorney's fee therein provided for to be entered up as a part of the judgment," and the power of attorney with the authority given any attorney, at any time after the date of the notes, in term time or vacation, "to waive the service of process and confess a judgment in favor of the holder of this note, for the above sum (\$700) and interest thereon, to the day of the entry of said judgment, together with costs and damages and \$10, and five per cent on the amount then due, as attorney's fees." And we have an option given to the holder of the writings to have a judgment entered at any time after the date of the writing for the principal sum named therein, with interest at seven per cent per annum from their date to entry of judgment, together with costs, damages and \$10, and five per cent on amount then due, as attorney's fees; which he may exercise or not as he may deem proper for his interest, and which he can enforce only by procuring such confession of judgment. A remedy given him which adds to the value of the paper, because providing against expense to the holder in enforcing its collection, and which does not increase the sum which the maker has agreed unconditionally to pay, unless the payee exercises such option and resorts to a court to enforce payment thereof in the way pointed out. The added agreement, by which the appellant authorized the legal holder to have judgment by confession at any time thereafter, for the stipulated damages and attorney's fees, does not render the amount the maker must pay or the time of its payment so uncertain as to destroy the negotiability of the paper, but simply gives the holder an additional remedy to enforce the payment, and a remedy which facilitates rather than incumbers its circulation. Daniel on Neg. Inst., Sec. 61, p. 52; Tiedeman on Com. Paper, Sec. 78b.

We know the authorities differ as to the negotiability of written instruments, otherwise negotiable, when there is superadded stipulations authorizing confession of judgment for the sum promised to be paid, with an added sum for collection and attorney's fees, but the later cases of most of the States, among them Illinois, maintain that such added stip-

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ulation does not render the paper non-negotiable. See Daniel on Negotiable Instruments (2d Ed.), Sec. 61, p. 52; Osborn v. Hawley, 19 Ohio, 130; Nickerson v. Sheldon, 33 Ill. 372; Dorsey v. Wolff, 142 Ill. 558.

The evidence introduced shows that the appellant signed and delivered to Bushell both of the notes sued on, knowing what they contained, and for the purpose of enabling him to purchase for appellant a saloon in Lincoln, Ill., from one Ben Sigg; and that Bushell deceived him, not in procuring him to execute the notes, but by not purchasing therewith the saloon, and afterward wrongfully, as against the appellant, transferred them to Maltby. This deception practiced by the payee upon the maker does not make the notes subject to the defense given the maker of such paper by the provisions of Sec. 14, Chap. 98, p. 2808, Starr & Curtis' Ill. Stat. (1896). Because, to enable the maker of a promissory note to be protected by the provisions of that section of the statute, the execution of the note must be procured by some fraudulent practice or device, fraud or deception in the consideration; or the wrongful putting the note in circulation will not defeat a recovery thereon by a *bona fide* purchaser for value before maturity. Shipley v. Carroll et al., 45 Ill. 285; Clark v. Johnson, 54 Ill. 296; Richelieu Hotel Co. v. International Mil. Encamp. Co., 140 Ill. 248.

On the trial the appellee put in evidence the two notes and the assignments on the back thereof, which are without date, the legal effect of which was to presumptively establish that appellee was the *bona fide* owner of the notes, by purchase for value without notice, and in due course of business before maturity, and entitled to recover the amount therein specified to be paid. See Woodworth v. Hunton, 40 Ill. 147; Depuy v. Schuyler, 45 Ill. 306; Cisne v. Chidester, 85 Ill. 523, and Bennis v. Homer, 165 Ill. 347.

The appellant, to make out a defense, should have overcome by proof the presumptions established as above stated (Bennis v. Homer, *supra*), but the evidence he presented neither did this nor tended to do it.

The testimony as to Bushell offering to sell the notes

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for a small amount to reimburse himself for the services he rendered appellant in trying to purchase the saloon from Sigg, or that the consideration for which the notes were given had failed, or the statements of Maltby that he did not know what he paid Bushell for the notes, or the articles published in the "Lincoln Courier," were not binding on the appellee, because they were not shown to have been brought to its notice before it purchased the notes. And as to the statement of appellee's cashier, when testifying; "that he never knew or had any business dealings with Maltby until a few months ago, and not before the notes were purchased by the bank," did not show or tend to show that the bank had not purchased the notes before maturity, because the appellee could have purchased the notes of Maltby without the cashier knowing him, or ever having any business transaction with him; and besides, the evidence shows conclusively that Maltby, the first assignee of the notes, told appellant's brother shortly after the notes were executed, and long before their maturity, that "he had assigned them to the bank (appellee) when talking to him about paying the notes; as the evidence shows, this brother had procured the maker of the notes to transfer to him all his lands, and Maltby, on that account, was anxious to know whether or not the brother would pay the notes at maturity, because, if, as he told him, "they were not paid, he (Maltby) would be liable to the Bank of Carlinville, Ill. (appellee), on his indorsement of them to it."

And it further appears that the appellee did procure a judgment on these notes by confession a very few days after they were due by their terms. So that there is no evidence in this record that would justify the jury in rendering a verdict for the appellant or the court in giving him a judgment if such a verdict had been rendered, and the court therefore properly directed the verdict it did.

As to the contention of counsel for the appellant, that the amount of the judgment is too large, because the appellee was only entitled to recover what it paid for these notes, we will say that inasmuch as there is no evidence in this

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record, except the presumption arising from appellee's possession of the notes with the indorsements, of the amount that the appellee paid for them, we are of the opinion that the appellant is in no position to raise that question, even if it is an open one in the courts of this State.

Finding no reversible error in this record, we affirm the judgment appealed from. Judgment affirmed.

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1. EVIDENCE—*Tending to Prove a Matter Admitted—Properly Rejected.*—It is the proper practice to reject evidence tending to prove a fact already admitted by the opposite party.

2. REAL ESTATE BROKER—*When Entitled to His Commission.*—A real estate broker, before he is entitled to commissions, must furnish a purchaser who is ready, willing and able to complete the purchase on the terms proposed, but if the vendor accepts the purchaser, and enters into a valid contract with him the commission is earned.

3. SAME—*Where One or Both of the Parties Refuse to Comply With the Contract.*—When the parties enter into a valid contract, capable of being enforced, and one or both the parties refuse to comply with such contract, the commission of the broker is earned, and he can recover.

4. SAME.—*Where the Seller Refuses to Compel Performance by the Purchaser.*—The broker is entitled to his commissions, by the purchaser procured by him and the vendor, his employer, entering into a valid and binding contract. If, after the making of such contract, the purchaser declines to complete the sale and the seller refuses to compel performance, the broker is not to be deprived of his commissions.

5. SAME—*What an Agreement to Obtain a Purchaser Implies.*—An agreement by a real estate broker to procure a purchaser, not only implies that the purchaser shall be one able to comply, but that the seller and the purchaser must be bound to each other in a valid contract.

6. SAME—*What an Agreement to Make a Sale Implies.*—Where the agreement of a real estate broker is to make a sale, his commission is earned when a contract is entered into mutually obligatory upon the vendor and the vendee, even though the vendee afterward refuses to execute his part of the contract.

Assumpsit, for broker's commission. Trial in the Circuit Court of Moultrie County; the Hon. WILLIAM G. COCHRAN, Judge, presiding. Verdict and judgment for plaintiff; appeal by defendant. Heard in

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this court at the November term, 1898. Reversed and remanded. Opinion filed June 3, 1899.

JOHN R. & WALTER EDEN, attorneys for appellant.

HARBAUGH & WHITAKER, attorneys for appellee.

MR. JUSTICE WRIGHT delivered the opinion of the court.

Appellees recovered a judgment against appellant for \$100 for commissions for procuring an exchange of property between appellant and J. W. Piper, from which this appeal has resulted.

The declaration contains a special and common counts, the former being to the effect that appellant employed appellees to sell or trade the property in question for the stipulated compensation of \$100, in case of sale or trade consummated, and in pursuance of such employment they did sell such property to J. W. Piper, who was then ready, able and willing to buy the property, and thereafter appellant and Piper entered into a written contract, by which appellant sold to Piper certain brick buildings in Sullivan, and stock of implements, hardware, fixtures, etc., therein, and in payment thereof Piper sold to appellant certain real estate described, in Wayne county, subject to incumbrances of \$2,135, and as further payment agreed to assume and pay a mortgage of \$2,000 then subsisting upon the Sullivan property, and to execute a second mortgage thereon for \$1,055 due in one year. It is averred that appellant accepted Piper as purchaser and thereby became liable to pay appellees the \$100. To the declaration the general issue alone was pleaded. The trial was by jury, resulting in a verdict for \$100.

The errors assigned and urged upon our attention, by which a reversal of the judgment is sought, are that the court admitted improper and rejected proper evidence, gave improper and refused proper instructions to the jury, the verdict is against the evidence, and that the court erred in overruling appellant's motion for a new trial.

In their argument counsel for appellant insist the court

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erred in rejecting the evidence of the condition of the title of the land of Piper, described in the contract. In view of the admission by appellees upon the trial, and the renewal of such admission in this court by counsel for appellees, that the title to Piper's property was defective, and that appellant had refused to comply with his part of the contract because of such defects of title, we can not say that appellant was prejudiced by such ruling of the court. The admission superseded all proofs upon the point in question, and rendered the rejection of the offered evidence harmless. Furthermore, we think it is the proper practice to reject evidence tending to prove a fact which has already been admitted by the opposite party.

There was no substantial difference in the respective claims of the parties on the trial concerning the conditions under which the \$100 was payable, appellees contending that it was the agreement that if they found a purchaser or traded that appellant should pay \$100, while appellant contended the agreement was that he was to pay when the trade was consummated, or the property was transferred. In the view we take of the case both these contentions mean the same thing, namely, that commissions were due only when appellee should produce a purchaser who was ready, able and willing to complete the purchase or exchange on the terms proposed, or that might be agreed upon between the parties. Here it is also pertinent to observe that this view is in harmony with the declaration wherein it is averred that Piper was then ready, able and willing to buy such property. Appellees thus, and as we think, properly, assumed the burden of showing that Piper, the alleged purchaser, was ready, able and willing to complete the purchase or exchange. Leahy v. Hair, 33 Ill. App. 461; Davis v. Gossette, 30 Ill. App. 41; Pratt v. Hotchkiss, 10 Ill. App. 603.

In the latter case it was said:

The true doctrine applicable to cases of this character is that a broker, before he is entitled to commissions, must furnish a purchaser who is ready, willing and able to complete the purchase on the terms proposed. True, if the

vendor accepts the purchaser, and enters into valid contract with him, the commission is earned.

Counsel for appellees earnestly contend that the latter sentence from the decision from which we have quoted, and also Wilson v. Mason, 158 Ill. 304, support the view that when appellant and Piper entered into the written contract recited in the declaration, appellant thereby accepted the purchaser and the commission was earned. It can no longer be doubted the rule in such cases in this State is that when the parties enter into a valid contract, capable of being enforced, and one or both of the parties refuse to comply with such contract, still the commission of the broker is earned, and he may recover. In the case of Pratt v. Hotchkiss, *supra*, the question whether the parties had entered into a valid contract was not before the court for decision, and we must accept the statement of the rule as an abstract proposition, and as such it is doubtless correct, if the word valid is to be understood in the sense that the contract so made was capable of being enforced as a legal or equitable remedy against the defaulting party. In Wilson v. Mason, *supra*, it was said: Some of the cases go so far as to hold that the broker is not entitled to his commissions unless the sale is actually accomplished by the delivery of the deed of the land from the vendor to the vendee, and the payment of the purchase money by the latter, or unless it is proven that the sale is prevented by the fault of the vendor. Other cases seem to hold that the broker is entitled to his commissions when the minds of the vendor and purchaser meet in verbal agreement for the sale of the one and the purchase by the other of the land. We are not inclined to follow either of these classes of cases, regarding them as extreme and exceptional. The true rule is that the broker is entitled to his commissions if the purchaser presented by him and the vendor, his employer, enter into a valid, binding and enforceable contract. If, after the making of such a contract, even though executory in form, the purchaser declines to complete the sale, and the seller refuses to compel performance, the broker ought not to be deprived of his

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commissions. He has done all that he can do when he produces a party who is able, and, in a binding form, offers to purchase upon the proposed terms. An agreement by a real estate broker to produce a purchaser not only implies that the purchaser shall be one able to comply, but that the seller and the purchaser must be bound to each other in a valid contract. So, where the agreement of the real estate broker is to make a sale, his commission is earned when a contract is entered into which is mutually obligatory upon the vendor and vendee, even though the vendee afterward refuses to execute his part of the contract of sale or purchase. (And cases cited.)

“An oral agreement upon the part of the purchaser of land would not be a valid agreement; and if he refused to complete the sale of the land after such oral agreement, without fault upon the part of the seller, the obligation of the broker would not be fulfilled, and he could not recover his commissions. (Citing cases.) Nor would a written agreement be binding upon the purchaser of land, under the statute of frauds, if such agreement were signed for by him by some other person not lawfully authorized by writing so to do.” (Citing cases.)

In the case presented it was admitted on the trial, and such admission is renewed by counsel in this court, that the title of Piper to the land he had agreed to exchange and convey to appellant was defective, and for such reason the trade was not consummated. Piper was not therefore able to complete his contract to convey title he did not have. If he did not have title the contract he had entered into with appellant was incapable of specific performance, and the record is wholly silent in respect to his ability to respond in adequate damages to appellant for a non-performance of his contract, even if such a remedy is contemplated by cases cited. It would seem from the quotations we have made from *Wilson v. Mason, supra*, that if there was a valid legal defense to the contract between the vendor and purchaser, on the part of the principal, the broker could not rightfully demand his commissions, but whenever either party to the contract refused to comply, without legal justification or excuse, the broker is entitled to his commissions. In the

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case here, it being admitted Piper had no title to convey, it would not be contended the latter had any grounds for a suit, either at law or in equity, against appellant upon the contract between them, and it was not, therefore, a valid contract enforceable in any manner against appellant, nor could he by means of any adequate remedy enforce it against Piper.

It seems plain to us that appellees failed to prove the purchaser procured by them was ready, able and willing to complete his contract, but on the contrary admitted he was not.

Counsel for appellant have criticised the instructions of the court, but upon an examination of them, when fairly considered, we are not disposed to believe they are out of harmony with the views herein expressed.

For the error that the verdict is against the evidence of the case, the judgment of the Circuit Court will be reversed and the cause remanded.

John McDavitt v. Thomas J. Boyer.

1. APPELLATE COURT PRACTICE—*Defective Records and Abstracts*.—Where the transcript of the record and the abstract contain no assignment of errors, as required by the rules, the appellant is not in a position to insist upon reversing the judgment appealed from for the reasons that the court improperly refused to allow his motion to strike the amended declaration from the files: that the verdict is contrary to the evidence, and that the damages are excessive.

Action for Slander.—Trial in the Circuit Court of Edgar County; the Hon. FRANK K. DUNNE, Judge, presiding. Verdict and judgment for plaintiff: appeal by defendant. Heard in this court at the November term, 1898. Affirmed. Opinion filed June 3, 1899.

GEORGE A. VAN DYKE, attorney for appellant.

S. I. HEADLY and J. W. HOWELL, attorneys for appellee.

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MR. PRESIDING JUSTICE BURROUGHS delivered the opinion of the court.

This was an action on the case for slander, by the appellee against appellant, tried by jury in the Circuit Court of Edgar County, resulting in a verdict and judgment for \$800. The appellant prosecutes an appeal to this court, and urges us to reverse that judgment for the following reasons: That the court improperly refused to allow his motion to strike the amended declaration from the files; that the verdict is contrary to the evidence, and that the damages are excessive. This case was before us at a former term (67 Ill. App. 452), and was taken by appeal to the Supreme Court, where the judgments of this and the Circuit Court were reversed and the case remanded to the latter court for another trial (169 Ill. 475). It was afterward tried twice in the Circuit Court, and the verdict of the jury in all the trials have been against the appellant. The transcript of the record in the case now before us, while it contains all the evidence, does not contain a motion for a new trial, a motion to strike the amended declaration from the files or any instructions.

Nor does the printed abstract of the record filed here by the appellant contain any assignment of errors on the record, as is required by our rules.

With the record in this case in the condition stated, the appellant is not in a position in this court to insist upon our reversing, or ought we to reverse, the judgment appealed from, for any of the reasons he urged in his oral argument or those urged by his counsel in the printed brief filed here in his behalf, being those stated above. See I. C. R. R. Co. v. O'Keefe, 154 Ill. 508; East St. Louis & L. E. R. R. Co. v. Cauley, 148 Ill. 490; Harman v. Brigham, 78 Ill. App. 427; and Superior Lumber Co. v. Tracey et al., 78 Ill. App. 551.

Appellee's counsel have not noticed or urged us to charge the appellant with the consequences of the defects in this record, as above stated, but have filed a printed argument herein in which they contend that the evidence fully justi-

fies the verdict for the amount of damages assessed, and the judgment rendered thereon.

We have therefore read and fully considered the evidence, and while we find some conflict on material questions of fact, yet there is ample to justify the conclusion reached that the appellant did wrongfully and maliciously utter and publish some of the slanderous accusations against the appellee with which the declaration charges him, and that the appellee was damaged thereby; and the record further discloses that three juries have been convinced that the witnesses who testified for the appellant were worthy of belief.

With the record in the condition we have pointed out and not desiring to invade the province of the jury in settling disputed questions of fact, we are compelled to affirm the judgment appealed from. Judgment affirmed.

Hiram Drum v. Doepehde & Chism.

1. **NEW TRIALS—*Newly-Discovered Evidence—When Insufficient.*** — Newly-discovered evidence upon an issue already tried will not be sufficient upon which to grant a new trial, unless it is conclusive and capable of definitely settling the matter in dispute.

Assumpsit, upon a promissory note. Trial in the Circuit Court of Macoupin County; the Hon. JAMES A. CREIGHTON, Judge, presiding. Finding and decree for plaintiff; appeal by defendant. Heard in this court at the November term, 1898. Affirmed. Opinion filed June 3, 1899.

PEEBLES, KEEFE & PEEBLES, attorneys for appellant.

RINAKER & RINAKER and J. B. SEARCY, attorneys for appellees.

MR. JUSTICE HARKER delivered the opinion of the court. This is a suit in assumpsit, brought by appellee against Hiram Drum and Philo Barto upon a promissory note for

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\$150, dated April 23, 1897, payable to the order of John W. Dalby, due in twelve months and assigned by Dalby to appellees on December 1, 1895. The only defense made was that the action was barred by the statute of limitations. Appellees relied upon proof of two payments made by Dalby to Drum to take the case out of the operation of the statute—one of \$30, made and indorsed September 24, 1888, and one of \$1.25, made and indorsed March 12, 1890. As to those payments there was a direct conflict between Dalby and Drum, the former testifying that they were made as indorsed and the latter denying.

Upon the trial the suit was dismissed as to Barto, and the court, hearing the case without a jury, found that the disputed payments were made, and rendered judgment against Drum for \$381.50.

We are not disposed to reverse the judgment for the alleged error of the court in finding the issues for the plaintiff. In the conflict it was the peculiar province of the trial judge to determine where the truth was. His opportunities for arriving at a correct conclusion were vastly superior to ours.

The chief reliance of appellant is that the court erred in overruling the motion for a new trial, based upon his affidavit of newly-discovered evidence. Upon the trial Dalby, after testifying in chief to the payment of the \$30 as indorsed, on cross-examination stated that it was paid upon the occasion of his calling upon Drum in 1888 with reference to a school order which had been issued to him that year, while Drum was school treasurer, and he was a school teacher in the township where they resided. The affidavit submitted by Drum in support of his motion for a new trial sets up as newly-discovered evidence that an examination of the treasurer's books of the township for 1888 shows that Dalby did not teach school in the township that year, and that no school order was issued to him for that year.

Newly-discovered evidence upon an issue already tried will not be sufficient upon which to grant a new trial unless it is conclusive and capable of definitely settling the matter

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in dispute. If it is merely cumulative and not decisive it will not answer. *Smith v. Shultz*, 1 Scam. 490; *Morrison v. Stewart*, 24 Ill. 24; *Martin v. Ehrenfels*, 24 Ill. 187; *Skelly v. Boland*, 78 Ill. 438; *Hays v. Houston*, 86 Ill. 487.

The newly-discovered evidence set up in the affidavit relates to the disputed fact of the payment of \$30, and can be regarded only as cumulative of evidence heard upon that issue, the circumstances of Dalby teaching in the township and receiving a school order in 1888 as merely incidental and not conclusive. If it could be demonstrated that he was mistaken as to teaching in the township that year it would not necessarily follow that the payment of \$30 was not made then.

The affidavit was not sufficient, and the court properly overruled the motion for a new trial. Judgment affirmed.

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William F. Cooper v. John N. English, Adm'r, et al., etc., with the Will Annexed.

1. **WILLS—Disposition of Lapsed Legacies.**—All lapsed gifts of personal property fall into a general residuary bequest, instead of being treated as intestate estate, unless a contrary intention on the part of the testator clearly appears.

2. **SAME—Effect of a Residuary Clause.**—As to personal estate, though it is otherwise as to real property, a residuary clause takes not only everything not disposed of, but everything that turns out not to be disposed of. The law raises a presumption in favor of the residuary legatee.

3. **PRESUMPTIONS—That a Testator Disposes of His Whole Estate.**—Where a man dies leaving a will which does not manifest a clear intention otherwise, the presumption is, that he intends to dispose of his whole estate, and this presumption exercises a controlling influence in settling a doubtful construction.

Bill to Construe a Will.—Trial in the Circuit Court of Jersey County; the Hon. ROBERT B. SHIRLEY, Judge, presiding. Decree for complainant; appeal by defendant. Heard in this court at the November term, 1898. Reversed and remanded, with directions. Opinion filed June 3, 1899.

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ED. J. VAUGHN, attorney for appellant.

No rule is better established as to personal estate than that a residuary clause carries not only everything not disposed of, but everything that in the event turns out not to be disposed of, as by lapse and the other means specified in the cases. The law raises a presumption in favor of the residuary legatee against every one except the particular legatee. Crerar et al. v. Williams et al., 145 Ill. 625 (p. 641); Mills v. Newberry, 112 Ill. 123; Missionary Society et al. v. Mead, 131 Ill. 338; 2 Woerner Am. Law Adm., Sec. 437, 462; Horner's Probate Law (2d Ed.), Sec. 133; 2 Redfield on Wills, 175, 176.

Jarman, in discussing the effect of a failure by lapse or otherwise of pecuniary gifts out of proceeds of land, uses this plain language, and which is clearly applicable to the lapsed legacy of \$500 to trustees of schools:

"Nor is it to be doubted that where a legacy is payable out of a fund of this description, upon a contingency which does not happen, the residuary devisee of the fund has the benefit of such failure, on the principle that, in the event which has happened, there is no actual disposition in favor of the legatee." 1 Jarman on Wills (6th Ed., Bigelow), page 625.

The heir at law claims the lapsed legacies as intestate estate; but the rule is familiar that the court will, if possible, so construe the will as to prevent partial intestacy. Horner's Probate Law (2d Ed.), Sec. 125; 2 Redfield on Wills (1866 Ed.), p. 442, par. 5 and 6; Howe v. Hodge, 152 Ill. 252 (270); Higgins v. Dwen, 100 Ill. 554; Scofield et al. v. Olcott et al., 120 Ill. 362; Decker v. Decker et al., 121 Ill. 341.

A residuary clause in a will is assumed by the law to have been inserted to prevent intestacy, and has that effect. Crerar et al. v. Williams et al., 44 Ill. App. 497.

Section 12, Ch. 39, R. S., entitled "Descent," does not render the lapsed legacies intestate estate. That section has no application here. Crerar et al. v. Williams et al., 145 Ill. 625.

HAMILTON & HAMILTON, attorneys for John N. English, administrator, etc.

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When a legacy is given upon a condition precedent not performed, the legacy falls into the residue; and when a legacy lapses, there being no residuary bequest, it will go to the next of kin as estate undisposed of under the will. 2 Redfield on Wills, 175, 176; Prescott v. Prescott, 7 Met. 141.

If legacies are given out of a particular fund or portion of the testator's estate, and the residue be given to B, it is a question of intention whether the gift to B is to be read as a gift of a mere balance of the fund, after deducting the legacies previously given, or as a gift of the whole fund subject to the legacies as charges. If the latter, lapsed and void interests fall into the particular residue; if the former, the gift to B is regarded as a specific bequest, and the lapsed and void interest falls into the general residue. Am. and Eng. Ency. of Law, Vol. 13, p. 50, and note 2, 1st Ed.

But if on the other hand, as in this case, it was the testator's intention for the executor, after payment of expenses of sale, to pay first the \$1,500 in legacies, and then the balance that remained (if any) after paying those legacies to be paid to appellant, the lapsed legacies would not go to appellant, but would, there being no general residuary clause in the will, become intestate estate, and be governed by Sec. 12, Chap. 39, Starr & Curtis R. S. 1896, Vol. 2, p. 1433; Mills v. Newberry, 112 Ill. 123.

GEO. W. HERDMAN, attorney for Marshall M. Cooper, appellee.

The heir at law is never to be disinherited, unless the testator has very clearly shown an intent to do so. Siddons v. Cockrell et al., 131 Ill. 653; 1 Jarman on Wills (6th Ed. Bigelow), star pages 326, 327.

The conversion in this case was not an "out and out" one, or to all intents. It was a conversion for the purpose of the will only. The executor could sell only so much of the land as was necessary to pay valid and unlapsed legacies, and the surplus in his hands, by reason of lapsed or void legacies, still retains the character of real estate, and goes to the general estate for the benefit of the heir at law, and not to the residuary legatee of the particular fund. Rich-

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ards v. Miller, 62 Ill. 417; Crerar et al. v. Williams et al., 145 Ill. 640; 1 Jarman on Wills (6th Ed. Bigelow), star pages 597, 598 and note 1; 599, 600, *et seq.*, also star pages 336, 337; 1 Redfield on Wills (Ed. 1864), page 276, par. 5.

In this will the testator excepted from the operation of the residuary clause relating to the particular fund the sum of \$1,500 given in specific legacies, and the costs of sale of the land, and then said, "The rest, residue and remainder of the proceeds from the sale of the above described tract of land (if any) I give and bequeath Wm. F. Cooper." 1 Jarman on Wills (6th Ed. Bigelow), star pages 314, 315, 316, and note q.; Williams on Executors, 3d Am. Ed., Vol. 2, star page 1252, *et seq.*; Am. and Eng. Ency. of Law, Vol. 13, pages 42, 43, and note 5; page 44, and note 3; pages 45, 46, 47, 48, and note 1; page 50, and note 2; 1 Jarman on Wills (6th Ed. Bigelow), star page 721, and note; pages 598 to 608, and 587 to 590.

MR. PRESIDING JUSTICE BURROUGHS delivered the opinion of the court.

This was a bill in chancery by John N. English, as administrator with the will annexed, of the estate of Jonathan E. Cooper, deceased, against the appellant Marshall M. Cooper, one of the appellees (an adopted son and sole heir of deceased), and some others, praying the court, among other things, to construe paragraph six of the last will of the testator; and instruct the administrator to whom he should pay the sum of \$250, given in that paragraph as a legacy to Mary E. McFain; and the sum of \$500 given to the Trustees of Schools of Tp. 8, Rg. 11, in Jersey county, for the use of School District No. 1, in that township.

The bill averred that Mary E. McFain died after the will was made and before the death of the testator, and that the boundaries of said school district had been changed during the same time, so that both of said legacies for those reasons had become lapsed. The bill further averred that by the directions of the Circuit Court of Jersey County, in a proceeding therein instituted for that purpose, the administrator had sold the forty acres of land described in para-

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graph six of the will and realized the sum of \$1,700 therefor.

A copy of the will was attached to the bill and made a part thereof, from which it appears there was no general residuary clause therein, nor any other provision making any reference to the forty acres of land or the proceeds thereof, except the sixth paragraph.

The appellant and appellee Marshall M. Cooper answered the bill and both admitted that the facts stated therein were true.

On hearing, the Circuit Court, after finding the facts as stated in the bill, decreed that \$750 of the proceeds of the sale of the said forty acres of land, representing the two said lapsed legacies, was intestate property of the deceased, and directed the administrator to administer it as such.

The appellant brings the case to this court by appeal, and urges us to reverse that decree on the ground that the court should have found and decreed that the \$750 was testate property and expressly given to him by the residuary clause of the sixth paragraph of the will, which is as follows:

"Sixth. I order, direct and empower my executor hereinafter named, to sell at public sale to the highest and best bidder, on such terms as he may think best for the interest of the estate, the northwest quarter of the southeast quarter of section number twenty-nine, in township number eight (8), north of range number eleven (11), west of the third principal meridian, in Jersey county and State of Illinois, and convey the above described tract of land by deed or deeds to the purchaser or purchasers of the same, and out of the proceeds thereof, after paying the expenses of said sale, I give and bequeath to my sister, Mary E. McFain, two hundred and fifty dollars (\$250).

To my namesake, Jonathan English Cooper, son of William F. Cooper, of Greene county, Missouri, Five Hundred Dollars (\$500.00), and in case of the death of the said Jonathan English Cooper, before said distribution shall have been made, then I order and direct that the said Five Hundred Dollars (\$500.00) intended for the said Jonathan English Cooper, to be paid to his father, William F. Cooper.

And to the Trustees of Schools of Township Number eight (8) North, Range Number eleven (11) West of the Third Principal Meridian, in Jersey county, Illinois, to their

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successors in office for the use of School District Number One (1), in said Township, Five Hundred Dollars (\$500.00), to be loaned by said trustees, and the interest arising therefrom be applied for general school purposes, for the benefit of said school district Number one (1) aforesaid : Provided the school house in said district Number one (1) remains on the present site and the boundaries of the said district remain as they now are.

And also out of the proceeds of said sale, I give and bequeath to my friend, Hannah White, Two Hundred and Fifty Dollars (\$250.00). And the rest, residue and remainder of the proceeds from the sale of the above described tract of land (if any) I give and bequeath to William F. Cooper, of Greene county, Missouri."

We think it is clear that the \$1,700 realized from the sale of the forty acres is personal property (*Jennings v. Smith*, 29 Ill. 116; *Baker v. Copenbarger et al.*, 15 Ill. 104; *Rankin v. Rankin*, 36 Ill. 293; and *Crerar et al. v. Williams et al.*, 145 Ill. 625); and it is a well settled rule that all lapsed gifts of personal property fall into a general residuary bequest, instead of being treated as intestate estate, descending to the heir at law, unless a contrary intention on the part of the testator clearly appears. See *Crerar et al. v. Williams*, *supra*.

"And no rule is better established as to personal estate, though it is otherwise as to real, that a residuary clause carries not only everything not disposed of, but everything that in the event it turns out not to be disposed of, as by lapse, and the other means specified in the cases; and that the law raises a presumption in favor of the residuary legatee." *Mills v. Newberry*, 112 Ill. 123; *Woman's U. M. Society v. Mead*, 131 Ill. 338; and *Crerar et al. v. Williams et al.*, *supra*.

In all of the cases above referred to, wills were being construed with reference to a general residuary clause therein; and in each case it was held that a lapsed legacy or gift of personal property fell into the residuum fund and passed to the residuary legatee as testate estate, for the reason that by putting a general residuary clause in his will, the testator thereby conclusively manifested his intention not to die intestate as to any of his personal estate. In the case at bar, the question presented is, where legacies are given in a

paragraph of the will out of a particular fund directed to be raised by the sale of a tract of land named, and the residue of such fund (if any) is expressly given to a legatee named, whether the gift of the residue is a gift of a mere balance of the fund after deducting the legacies previously given, or a gift of the whole fund subject to the legacies as charges? If the bequest to the appellant in the sixth paragraph of this will is a gift of the whole proceeds of the forty acres, subject to the legacies as mere charges on the proceeds, the lapsed legacies must fall into the residue; but on the other hand, if the bequest to the appellant is a gift of the residue of the proceeds after deducting the legacies previously given, then the bequest of the residue is but a specific gift, and the lapsed legacies are intestate estate.

In the absence of any other disposition of the proceeds of the forty acres of land by the testator in the other part of his will, the character of the legacy given to appellant in the sixth paragraph, as to whether it is the one or the other, must be determined by arriving at the intention of the testator as manifested by the language he used in this paragraph. See Am. & Eng. Ency. of Law (1st Ed.), Vol. 13, p. 50.

The provisions of the whole will clearly show that the testator did not intend to die intestate as to any of his property, and especially as to the proceeds of the forty acres of land described in the sixth paragraph; for after he had given \$1,500 of it to the four legatees therein named, he then said, "And the rest, residue and remainder of the proceeds from the sale of the above described tract of land (if any) I give and bequeath to William F. Cooper, of Greene county, Missouri," thereby, we think, manifesting his intention not to die intestate as to any part thereof. By construing this paragraph of the will as giving the appellant the whole proceeds, subject to the legacies previously given as charges upon the fund, we not only solve a doubtful intention in favor of testacy, at all events as to this fund, but we also carry out the presumption that by making a will and disposing of all this fund, the testator intended not to die intestate as to any part of it; but if

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we construe the residuary bequest to the appellant in the sixth paragraph as a gift of the mere balance of the fund after deducting the four legacies therein previously given out of it, we do not so effectually carry out such presumptive intention, because we thereby say the testator intended to die testate or intestate, as to all of that fund, depending upon whether any one of the three legatees to whom he gave a part thereof died before him, or the boundaries of the school district be changed before his death.

The presumption, where a man dies leaving a will which does not manifest a clear intention otherwise, is that he thereby intends to dispose of his whole estate, and this presumption often exercises a controlling influence in settling a doubtful construction. *Scofield v. Olcott*, 120 Ill. 374; *Woman's U. M. Society v. Mead*, *supra*, and *Howe et al. v. Hodge et al.*, 152 Ill. 252.

It has been said "That the idea of any one deliberately proposing to die testate as to a portion of his property, and intestate as to another portion, is so unusual in the history of testamentary disposition as to justify almost any construction to avoid it." *Redfield on Wills*, Vol. 2, p. 235; *Jarman on Wills*, Vol. 2 (R. & T. Ed), p. 469, quoted approvingly in *Scofield v. Olcott*, *supra*, p. 374; *Missionary Society v. Mead*, *supra*, p. 359; and *Howe v. Hodge*, *supra*, p. 270.

We are of the opinion, therefore, that the learned chancellor who rendered the decree appealed from erred when he found that the lapsed legacies in question were intestate estate, and decreed that it be administered as such.

We therefore reverse the decree and remand the case to the Circuit Court of Jersey County, with instructions to decree that the \$750 in the hands of John N. English, administrator with the will annexed of Jonathan E. Cooper, deceased, which represents the two lapsed legacies mentioned in the bill of complaint herein, is testate estate and is expressly bequeathed by the residuary clause, of the sixth paragraph of the will of Jonathan E. Cooper, deceased, to William F. Cooper, the appellant, to whom it should be paid by the administrator, John E. English. Decree reversed and cause remanded with instructions.

CASES
IN THE
APPELLATE COURTS OF ILLINOIS

FIRST DISTRICT—MARCH TERM, 1898.

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Louis H. Jacobs v. Dora Marks.

1. PLEADING—*In Actions for Deceit*.—A declaration in an action for deceit, which avers the making, knowingly, of the false statements in relation to a matter material to the transaction, the reliance of the plaintiff upon such statement as true, and that he was induced thereby to act to his detriment and loss, if sustained by proof, will authorize a recovery.

2. EVIDENCE—*Knowledge of Falsity in Actions for Deceit*.—Positive proof of knowledge of the falsity of representations by the person making them is not required, but may be inferred from other facts which are proved.

Action in Case, for deceit. Trial in the Circuit Court of Cook County; the Hon. RICHARD W. CLIFFORD, Judge, presiding. Verdict and judgment for plaintiff; appeal by defendant. Heard in the Branch Appellate Court at the March term, 1898. Affirmed. Mr. Presiding Justice WINDES dissenting. Opinion filed May 26, 1899.

BLUM & BLUM, attorneys for appellant.

- JOHN W. BYAM and CHARLES L. MAHONY, attorneys for appellee.

MR. JUSTICE SHEPARD delivered the opinion of the court upon a rehearing.

A rehearing was granted February 24, 1899, upon petition of appellee. The appellant has not availed himself of

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his right, under the rules of this court, to answer the petition, although the ten days allowed by the rules within which to make such answer have long since elapsed. We must, therefore, as is provided by the rules, consider the cause once more upon the record, abstracts, original briefs and the petition for rehearing.

Our former opinion proceeded upon the theory that the facts appearing in this record were substantially the same as those set forth in the criminal cause, entitled People v. Jacobs, 72 Ill. App. 276, wherein Jacobs having been convicted, was plaintiff in error and not defendant in error.

But, upon further consideration, we think there is a material distinction in some respects between the facts of this case and of that one, and furthermore, that we should consider this case in a somewhat different aspect than was there presented, because of the special finding of the jury in this case, and not there existing, upon a controlling question of fact.

In response to a special request submitted to them by the appellant, the jury found that appellee did not sign a certain agreement between herself and the appellant and one Neufeldt on the day of its date. Great stress is laid in the opinion, in the criminal case above referred to, upon the there claimed fact that appellee did sign said agreement on the day of its date, which is the exact opposite of the fact as found by the jury in this case.

The declaration here is for deceit by appellant in inducing appellee, by means of false and fraudulent representations, to her made by appellant, to part with \$5,000 of her money.

It is averred:

“That the defendant (appellant) desired to join with one Nathan Neufeldt in the business of the manufacture and sale of furniture at * * *, and to incorporate a company for the purpose of carrying on said last enterprise; * * * that the defendant was a man of small means, and was required by said Nathan Neufeldt to furnish more money to the enterprise than the defendant had, and for that purpose was required by the said Neufeldt to induce

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some third person to put money into the said enterprise, who would agree to become one of the corporation for the purpose of carrying on the said scheme of manufacturing and selling furniture; * * * that the defendant, being anxious to join the said Neufeldt in said scheme or enterprise, and being further desirous to induce the plaintiff to join with him and said Neufeldt in said scheme for incorporation and the enterprise of sale and manufacture of furniture at * * *, on or about the 15th day of June, A. D. 1893, wrongfully and injuriously contriving and intending to deceive, defraud and injure the plaintiff (appellee) in this behalf, falsely, fraudulently and deceitfully represented and asserted to the plaintiff that said Nathan Neufeldt was a man of large wealth and means, the owner of the house he lived in at Chicago, which said defendant averred was worth twenty thousand dollars, and the owner of a factory at Chicago, which said defendant averred was worth sixty thousand dollars; that said Neufeldt would contribute twenty-five thousand dollars in cash as his share of the money to be put into the said corporation at its beginning, and that he, defendant, would pay into the said corporation the sum of twelve thousand and five hundred dollars, and * * * the plaintiff, confiding in the said representations and assertions of the defendant, at the request of the defendant agreed to pay to said defendant the sum of five thousand dollars to be applied about the business of the corporation to be formed of the plaintiff and defendant and Nathan Neufeldt, for the purpose of manufacture and sale of furniture. * * * And the defendant, by falsely, fraudulently and deceitfully pretending and representing to the plaintiff that the said false, fraudulent and deceitful representations of the defendant were true, caused the plaintiff * * * to pay to the defendant the sum of five thousand dollars for the purpose of becoming a member of the corporation to be formed, * * * whereas in truth and in fact the said Neufeldt did not own the said house he lived in, nor a factory at Chicago worth twenty thousand dollars and sixty thousand dollars, respectively, nor did he own any real estate, house or factory, nor did the said Neufeldt promise or intend to pay to the said corporation and enterprise the sum of twenty-five thousand dollars in cash, nor did the defendant intend to put into the said corporation and enterprise twelve thousand five hundred dollars in cash, as the defendant at the time of his making his said false and deceitful representations well knew; and the plaintiff further saith that the defendant, by means of

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the premises, * * * falsely and fraudulently deceived the plaintiff, and induced her to become a member of the corporation formed of the plaintiff and defendant and the said Neufeldt, * * * and to take shares in the same, and thereby the said shares of stock in the said corporation have become and are of no use or value to the plaintiff," etc.

The gist of the representations averred in the declaration and relied upon by appellee is not of what either Neufeldt or Jacobs would do in the future—not that they or either of them would put money into the enterprise at some future time—but is as to Neufeldt's present property and financial ability.

It was the representation that Neufeldt was then, at the time the representations were made, a man of large wealth, the owner of the house he lived in, worth twenty thousand dollars, and the owner of a factory worth sixty thousand dollars—present, existing and material facts—that constituted the false representations which induced appellee to contribute her five thousand dollars to the enterprise.

It is true, the representations that Neufeldt would contribute twenty-five thousand dollars, and that Jacobs would contribute twelve thousand five hundred dollars, were as to something to be done in the future by them, and if they were all that is relied upon the declaration would fail to sustain the recovery. It was proper to state those facts in the declaration as a part of the history of the transaction, but the deceit relied upon does not depend upon them. They are important only in considering whether the representations as to present ability were false and were material.

Appellee might readily believe that the future promises would be performed if she were assured of the present ability of Neufeldt to perform them. To show to appellee his present ability to perform the future acts, the representations were made of his present ability, and were material representations. It was them that appellee avers she relied upon as true, and was induced to put in her money because of, and they and their falsity, and appellant's knowledge of their falsity, at the time he made them, were explicitly averred.

A declaration in an action for deceit, that avers the making, knowingly, of the false statement in relation to a matter material to the transaction, the reliance of the plaintiff upon the statement as true, and that plaintiff was induced thereby to act to his detriment and loss, will, if sustained by proof, authorize a recovery. *Merwin v. Arbuckle*, 81 Ill. 501.

Positive and direct proof of knowledge of its falsity, by the one making the representation is not required, but may be inferred from other facts that are proved. *Hiner v. Richter*, 51 Ill. 299.

We regard the declaration as sufficient.

The false representations, the knowledge by the appellant that they were false, their falsity in fact, the materiality of the representations, the reliance upon them by appellee and the consequent damage, all sufficiently appear in the declaration.

The declaration avers the representations to have been made on June 15, 1893.

The appellant introduced in evidence an agreement signed by Neufeldt, the appellant and the appellee, dated June 8, 1893. If this agreement were signed by appellee on the date it bears, her contention that she entered into the enterprise relying upon the truth of the representations, averred by her declaration to have been made on June 15th, must fall.

It is this agreement which the jury specially found was not signed by appellee on June 8, 1893.

The day the agreement bears date the appellee was in Escanaba, Michigan, the place of its date, and she might, physically, have signed it at that time and place.

The appellee testifies positively that she did not sign the paper on the day it is dated, and names the date of signing it as August 22, 1893, and she details numerous circumstances in corroboration of her statement.

There is nothing in the paper, of an intrinsic nature inconsistent with the fact of its being signed at either time.

Whether the evidence of the appellee, as to the date of

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signing the paper, and the corroborating circumstances to which she testified, should or not prevail over the testimony of appellant and the Michigan lawyer, both of whom testified that it was signed in Escanaba on the date it bears, is difficult to say. The circumstance that the Michigan lawyer, who was also a notary public in that State, took the acknowledgment in Chicago of the execution of these parties and Neufeldt, of the incorporation papers, filed with his certificate of acknowledgment, in the office of the Secretary of State of Michigan, when, as he testified, he had not authority as notary public to take acknowledgments out of the county in Michigan for which he was appointed, may have materially discredited the weight of his testimony in the minds of the jury. The further fact that Neufeldt, who was present at the interviews on June 8th and on August 22d, and testified in the case, was not questioned as to the time or place of appellee signing the paper, may also have had weight in the minds of the jury. If such circumstances were given much weight by the jury, and they were entitled to be considered, the jury had a sufficient basis for their finding in appellee's favor upon the fact of when the paper was signed. As between appellee and the appellant, the jury might well have believed her in preference to him. A party who takes advantage of a confiding friend is quite likely to be discredited when he undertakes by his mere word to justify his conduct.

The special finding is in all respects consistent with the general verdict, and there is no such preponderating weight of evidence against its correctness as to justify us in disregarding it. •

Appellant contends that the appellee is materially contradicted, in material respects, by her own testimony, given in an attachment suit brought by her against the corporation in the courts of Michigan. The record in this case does not show any such contradiction. Upon the trial, appellant's counsel asked appellee if certain questions were not put to her upon the trial of the suit in Michigan, and if her answers thereto were not as reported to her. Her answer to the

question which was put to her (embodying in one question what purported to be several questions to and answers by her in the Michigan suit), was: "It is over three years ago, and I can't say just what I said on the stand up there."

An argument based upon the assumption that she testified in this suit that Neufeldt and Jacobs were not to put in their part of the contribution to the capital of the corporation in a lump sum, but only from time to time, as the business required it, is valueless.

The only evidence in this record of any testimony given by appellee in the Michigan suit was the testimony of a stenographer who took shorthand notes of the testimony given in that case, and who, with such notes before him, testified in this case as to what her testimony there was. He, however, did not testify that he had any recollection of her testimony independently of his notes, nor that the notes truly represented her testimony, nor that the notes were in the same condition at the time of the trial as when taken down in the Michigan suit, nor does it appear in what connection, in that suit, with other testimony there given, her testimony, if as stated, was given.

The falseness in fact of the representations made to appellee by appellant, their materiality, the reliance of appellee upon them believing them to be true, and her consequent loss, are too plainly established by the evidence to leave room for questioning the verdict upon the ground that the evidence in those respects fail to support it. The knowledge by appellant at the time of their making, that as to Neufeldt they were false, is the only remaining material fact concerning which it may be urged there is room for doubt. But considering all the circumstances in evidence—including the particular ones that appellant had been in the employment of Neufeldt for six or seven years just before, in a responsible position, and seemed, according to his testimony, to have possessed Neufeldt's confidence concerning his business affairs, and the evidence that tended to show that Neufeldt and appellant had previously entered into an agreement that appellant should have a salary of \$3,500 per

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year from the proposed corporation if he would get appellee into the enterprise with her money—we may not say that the jury were not justified in finding this fact also against appellant.

Our conclusion is that, upon the facts, the verdict must stand.

But appellant contends also that there is material error of law in the record.

After appellant's demurrer to the declaration was overruled by the Circuit Court he interposed, besides a plea of the general issue, a special plea, wherein it was set forth that after the time at which said false representations are alleged to have been made, appellee brought a suit in Michigan, against the corporation that was formed, involving the same subject-matter as this suit; that jurisdiction of the parties and subject-matter was acquired in that suit, and that thereafter a settlement of said cause was come to, and before this suit was begun the Michigan court entered of record in that cause an order, as follows:

“This cause having been settled, it is hereby discontinued by consent of both parties, without cost to either party.”

To such special plea the appellee filed a denial of its truth by replication, and upon the issue made upon the plea evidence was heard and instructions given, with the result of a verdict adverse to the truth of the plea.

Appellant insists that even if the subject-matter of the plea was immaterial, appellee made it material by replying to it, and made the result of the case depend upon the determination of the issue upon the plea. Possibly, but the issue upon the truth of the plea was found against him. It is also insisted that under the evidence, upon the issue presented by the plea and replication, the jury should have been instructed, as was requested, to find for appellant. It would have been manifestly improper for the court, under the evidence, including the written agreement entered into as the basis for the discontinuance of the Michigan suit, to have given the instructions that were offered and refused

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concerning the legal effect of the settlement of the Michigan suit.

The court did instruct the jury, at appellant's request, in respect of the Michigan suit and its settlement, as follows:

"You are instructed that if you find from the evidence that the plaintiff herein instituted a suit in the Circuit Court of Delta County, Michigan, against the Chicago Furniture & Lumber Company, for the purpose of recovering the \$4,000 involved in this suit now before you, and that she made a settlement of this case with the defendant therein, or any one else, that the plaintiff is barred from the further prosecution of this suit, and the verdict of the jury must be for the defendant."

Such instruction was, to say the least of it, all that the appellant was entitled to in respect of the matter covered by it. To have gone further, as the court was requested to do, and instruct the jury that under the evidence, before them they should find a verdict for the appellant, would have been most manifest error, the evidence being considered.

We can not follow appellant's argument that the discontinuance of the Michigan suit amounts to a *retraxit* in practice, and constitutes a bar to this action, further than to agree with him as to the legal effect of a *retraxit*, as between the parties to a suit, and that it differs from a non-suit, and also from a *nolle prosequi*.

The argument is without force when applied to the evidence introduced under the issue that was made upon the plea. The written agreement alone, under which the suit was discontinued, dissipates the force of the contention.

The point is made that the attachment writ in this case should have been quashed for non-compliance with the statute in the manner of suing it out. We will not prolong our opinion by a discussion of the question. The alleged error in such regard was not given among the reasons filed in the Circuit Court as grounds for a new trial, nor was it included in the single ground of variance, upon which the motion in arrest of judgment was based. We have, however, considered the question upon its merits

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sufficiently to conclude there was not any material error committed in respect of it.

Upon a consideration of the whole record, the judgment is right, and should be affirmed.

MR. PRESIDING JUSTICE FREEMAN, dissenting.

This was an action for deceit. The facts are substantially the same as in People v. Jacobs, 72 Ill. App. 286, where they are stated clearly and at length. There is no material difference in the evidence between that case, as it is stated in the opinion, and the one now presented.

The question was submitted to the jury, whether the contract of June 8, 1893, was signed on that day, as claimed by appellant, or in August following, as testified by appellee. The jury found specially that it was not signed June 8th. But this finding is upon evidence almost identical with that before the other branch of this court in the criminal case. It was there said: "We are of opinion that there is a decided preponderance of evidence that the contract of date June 8, 1893, was signed on the day of its date."

The fraud and deceit charged in the declaration are that defendant was a man of small means; that he represented that one Neufeld was a man of large wealth and means, the owner of the house he lived in at Chicago, worth \$20,000, and of a factory at Chicago worth \$60,000; and that he, Neufeld, would contribute \$25,000 in cash to the new enterprise at its beginning, and that the defendant Jacobs would pay in \$12,500; and that, confiding in these statements, appellee paid in \$5,000; whereas, in fact, Neufeld did not own said property, and did not "promise or intend to pay" in \$25,000, nor did defendant intend to pay in \$12,500, as he at the time well knew, and that the plaintiff was thus deceived.

Appellee subsequently drew out \$1,000, which was returned to her by appellant, leaving the amount of her investment \$4,000.

The allegation in the declaration that appellant was a man of small means, and that, desiring to induce appellee to invest \$5,000 in the enterprise, he wrongfully, intending

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to deceive and defraud, falsely, deceitfully and fraudulently represented that Neufeld was a man of large wealth and means, the owner of the house he lived in at Chicago worth \$20,000, and of a factory in Chicago worth \$60,000, charges a false representation as to existing facts, and it is the only such allegation in the declaration. It is alleged that the representations were made on or about the 15th day of June, 1893. If the contract of June 8th was actually signed on that day, and in my opinion the evidence that it was so signed decidedly preponderates, then these alleged false representations were made after appellee had agreed with Neufeld and Jacobs to subscribe \$5,000 for stock, and could have had no influence in inducing her to do so.

But, accepting the jury's finding upon that point as conclusive, this allegation as to Neufeld's wealth can hardly be considered as material, by itself, and it is coupled with and made a part of the other allegation upon which appellee relied, according to her declaration and evidence, setting forth representations that Neufeld and Jacobs would contribute the amounts stated to the new corporation. If Neufeld had actually made such contribution the amount and value of his property would have been immaterial.

But these statements alleged in the declaration to have been made by Jacobs, but which appellee testifies were made by Jacobs and Neufeld, respectively, namely, that Jacobs *would put in* \$12,500 cash, and that Neufeld *would put in* \$25,000 cash, were merely promissory.

In People v. Healy, 128 Ill. 9-15, it is said :

"In an action to recover for fraud and deceit, the plaintiff must allege the facts relied on as constituting the fraud, and where false representations are relied upon it is essential that they relate to some material existing fact or facts, and not to the future intention of the defendant, which he may or may not perform."

And the court quotes from Kerr on Fraud and Mistake, 88 :

"As distinguished from the false representation of a fact, the false representation as to a matter of intention, though it may have influenced a transaction, is not a fraud in law."

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The falsity of these statements, even though the promise was not intended to be complied with, would not necessarily be proven by evidence tending to show that Jacobs and Neufeld did not at the time possess the means to enable them to put in that amount of cash. The intention might have been perfectly honest, and based upon expectations of being able to raise the amount as needed from time to time. Neufeld's testimony tends to show that he was able to raise the amount agreed to be contributed by himself, and Jacobs appears from the evidence to have had nearly three-fourths of the amount agreed to be contributed by him.

"It can not be said that these representations were false when made, for, until the proper time arrived, and plaintiff refused to comply with them, it could not positively be known that they would not be performed." Gage v. Lewis 68 Ill. 604, 615.

And in the same case it is said :

"A promise to perform an act, though accompanied at the time with an intention not to perform, is not such a representation as can be made the ground of an action at law. The party should sue upon the promise, and if this be void he has no remedy."

Representations alleged to be false, which the evidence in this case tends to show relate to a material existing fact, are testified to by Mrs. Marks as having been made when she turned over her certificate of deposit for the purpose of paying in her own contribution to the capital stock of the new corporation. She says she was informed by Jacobs that he and Neufeld were ready to put their money in, and that Neufeld produced three papers, white and blue, one of which she thought looked like her certificate of deposit, and said : "Here is our money." If this evidence could justify the conclusion that Jacobs and Neufeld then and there falsely represented that they were about immediately to put in, the one \$25,000 and the other \$12,500, and that Neufeld had the money, his own and Jacobs', or its equivalent, actually in his hands as an officer of the company, and that thereby appellee was induced to pay in her contribution, being falsely led to believe that by so doing the capi-

tal would be fully paid up and was based upon proper allegations in the declaration, a different case would be presented. But such is not the evidence. Appellee herself says that she understood the money of the others was to be paid in from time to time, "just as the business required it." It is conceded that both Neufeld and Jacobs did put in money, and appellee's testimony as to what occurred on that occasion is entirely consistent with the view that the papers produced were certificates or drafts representing money of theirs then contributed.

I am of opinion that the declaration fails to state a sufficient cause of action.

"A verdict will aid a defective statement of a cause of action, but will never assist a statement of a defective cause of action." C. & A. R. R. Co. v. Clausen, 173 Ill. 100, 104.

The investment was unfortunate, and it is quite possible that appellant took advantage of appellee's confidence in him to induce her to join in the enterprise which proved unsuccessful. But I am unable to concur in the opinion that a case has been made out entitling her to recover in this action.

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Joseph J. Lanzit v. J. W. Sefton Mfg. Co.

1. CONTRACTS—*Breach of, Equity Jurisdiction.*—The relief in equity, if any, to which a party is entitled for a violation of a contract, is predicated upon the reason that there is no adequate remedy at law.

2. SAME—*In Restraint of Trade.*—Parties may make a valid agreement in restraint of trade where the operation of the agreement is partial and limited under reasonable conditions, and where it is supported by a valid consideration.

3. SAME—*In Restraint of Trade in General—Against Public Policy.*—A contract in restraint of trade is general, when by it a party binds himself not to carry on his trade or business at all, or not to pursue it within the limits of a particular country or State. Such a general contract in restraint of trade, necessarily works an injury to the public at large, and to the party himself, in the respects indicated, and is against public policy.

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4. **EQUITY PRACTICE—Harmless Error.**—Objections as to the admission of evidence on the hearing by the master, even if well taken, where they relate mainly to immaterial and unimportant items of evidence and can not affect the findings of the master nor the decree of the court, for the reason that there is sufficient competent evidence in the record to justify a decree, are not sufficient to warrant a reversal. It will be presumed that the master and the court both based their conclusions upon the competent proof.

5. **RESTRAINT OF TRADE—Contracts in, Must be Reasonable.**—A contract which is only in partial restraint of trade is valid, provided it is reasonable and has a consideration to support it. The restraint is reasonable when it is such only as to afford a fair protection to the interests of the party in whose favor it is imposed.

6. **SAME—Contracts in, are Divisible.**—Contracts in restraint of trade are divisible; a part may be held to be valid and a part void because of unreasonable restraint as to time or territory, or both.

Bill for Injunction.—Trial in the Superior Court of Cook County; the Hon. THEODORE BRENTANO, Judge, presiding. Hearing and decree for complainant; appeal by defendant. Heard in this court at the October term, 1898. Affirmed, except as indicated and reversed with directions to modify, etc. Opinion filed June 12, 1899.

Statement of the Case.—Appellant and appellee made the following contract upon the considerations therein named, viz.:

“CHICAGO, ILL., February 3, 1897.

As a special consideration for the purchase this day by the J. W. Sefton Manufacturing Company, an Indiana corporation (doing business, also, in Chicago), from me of my share and interest in and to the said business heretofore conducted by himself and Mrs. Margaret Banks, at Chicago, Illinois, under the firm name and style of Joseph J. Lanzit Manufacturing Company, in accordance with the terms of a certain bill of sale, made at Chicago, Illinois, this day;

As a special consideration for the employment of me by said J. W. Sefton Manufacturing Company, as a salesman in accordance with a certain contract of employment, made at Chicago, this day, and for one dollar, and other good and valuable considerations, the receipt whereof I hereby acknowledge,

I, Joseph J. Lanzit, of Chicago, Illinois, do hereby expressly covenant and agree, as follows: That for the period of ten years from this 3d day of February, 1897, I will not anywhere in the United States of America directly or indirectly, either alone or with any other person, firm or

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corporation, as employe, stockholder, officer, manager or otherwise, or in an advisory capacity, set up, follow or engage in the business of manufacturing, buying, selling, handling or dealing in paper receptacles, paper oyster pails, clothing boxes, folding paper boxes, or paper novelties of any kind or description whatsoever, nor will I furnish any other person, firm or corporation with any information relating to or concerning any of said business."

Then follows a paragraph identical with the last, except that the territory named, instead of the United States of America, is the State of Indiana or Illinois, and this in turn is followed by a paragraph in which the territory named is the State of Illinois, and it by a paragraph in which the territory named is Cook county, Illinois, after which is the following:

"All the above restrictions are subject to the exceptions of my employment with the said J. W. Sefton Manufacturing Company, as per said contract of employment this date.

In witness whereof, I have hereunto set my hand and seal at Chicago, Illinois, this 3d day of February, A. D. 1897.

Jos. J. LANZIT. [SEAL.]

FRED W. JOB, Witness."

The contract of employment mentioned above is dated 3d of February, 1897, between the Sefton Manufacturing Company and Lanzit, and is, in substance, that in consideration of the mutual covenants therein contained, among which was his agreement in the contract above, by the terms of which it is stated, "Lanzit agrees not to engage in the same business now conducted or hereafter to be conducted by the Sefton company for a certain length of time within certain territorial limits," it is agreed that the Sefton company employs Lanzit as a salesman, and Lanzit agrees to devote his entire and exclusive attention and energy in selling such goods for the Sefton company as it may designate, and at such places and prices as the Sefton company may designate, for the period of one year from the date of this contract, and that Lanzit shall receive \$50 a month for the first six months; that if his sales from that period amount to more than \$12,500 and less than \$15,000, his wages during the last six months shall be \$60 a month; if, during the first six

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months, he sells over \$15,000 worth, then during the next six months his salary shall be \$75 a month; also, that he was to be paid his usual and ordinary expenses as a salesman.

The contract provides that he shall not engage in any other business during the time he is employed by the Sefton company, and is signed by both the company and Lanzit, and witnessed.

It appears that the business conducted by the Lanzit Manufacturing Company prior to said contracts of February 3, 1897, was a similar business to that of the Sefton company, theretofore and at that time, carried on by the latter company.

The business of the Sefton company since February, 1897, was manufacturing oyster pails, ice cream boxes, berry boxes, ice cream brick boxes of all kinds, starch boxes, cake boxes, cartons, charlotte russe boxes, and all boxes ordinarily used by bakers, soup boxes, flower boxes, corrugated paper boxes, corrugated paper of all kinds and descriptions, corrugated paper bottle packing, corrugated fillers, known as envelopes in corrugated paper, wooden bottle packing, Cuba Libre "ouches," and all styles of folding boxes, and all styles of envelopes in paper that can be cut in cutting or printing presses. It also had facilities for cutting or printing all styles of paper that could be cut or printed, if they were required; but as a matter of fact it did not make any paper novelties except those specifically mentioned above.

It appears that charlotte russe boxes, paper boxes, pie plates, oyster pails, and all that class of goods are known as "paper novelties."

Appellant was an employe of appellee under said contract of February 3, 1897, until its expiration one year from that date, and thereafter, on March 1, 1898, he entered the employ of the Fred Rentz Paper Co., a corporation under a contract of that date, whereby he engaged to serve said company for the period of two years from the date of said contract as an employe, not only of said corporation,

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but of one Fred Rentz, the president thereof, in any business that the said Rentz might require the services of Lanzit. On or about said March 1, 1898, said Rentz entered into copartnership with one Anna Rafferty, otherwise known as Anna Rafty, formerly an employe of appellee in the manufacture and sale of paper oyster pails, paper ice cream pails and kindred merchandise, under the name and style of the Chicago Oyster Pail Company. The said firm then rented a room in a building owned by said Fred Rentz, and has there conducted the business of dealing in said oyster pails, ice cream pails and kindred merchandise from thence hitherto. Said Fred Rentz caused to be placed in the room so occupied by the said Chicago Oyster Pail Company, a printing press, where said Lanzit was directed by said Rentz to, and has from thence hitherto, set up the type for and managed the printing of the said Oyster Pail Company, and where said Lanzit, under the instruction of said Rentz, has spent one-half of his time from said first day of March, 1898, to the date of the decree herein. The other half of the time of said Lanzit has been devoted to the interests of said Fred Rentz Paper Company as an employe in selling the product of the said Fred Rentz Paper Company. The business of the said Fred Rentz Paper Company, among other things, during all the time aforesaid, was and now is buying, selling, and otherwise dealing in paper oyster pails, paper novelties and kindred merchandise. Said Lanzit has in fact, and in an advisory capacity and otherwise, engaged in the business of dealing in paper oyster pails, and paper novelties in connection with the said firm, the Chicago Oyster Pail Company, and has furnished it information relating to said business.

It also appears that appellee's said business was, on February 3, 1897, and continually since that time has been, largely transacted from its office in the city of Chicago, in the State of Illinois; that the manufacturing conducted by it was on February 3, 1897, and theretofore and ever since has been largely conducted in the State of Indiana; that it also sells largely from Indiana and manufactures largely in

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Illinois, and the said States of Indiana and Illinois are the States in which a large proportion of its selling business and all its manufacturing is done, and that the said facts relating to the business of appellee were well known to said Lanzit when he made said contracts with appellee.

May 4, 1898, appellee filed its bill against appellant, which was later amended, alleging, among other things, substantially the above matters, and asking an injunction against him from violating the terms of said contracts of February 3, 1897, between him and appellee, in so far as they apply to the States of Indiana and Illinois.

After appellant's demurrer to the bill was overruled he answered, admitting said contracts with appellee and with the Rentz Paper Co., but claims that the contract not to engage in business for the period of ten years from February 3, 1897, as stated, was made without any consideration, and therefore void, and was also void as being in restraint of trade and contrary to public policy, and denies that he had in any way violated it, and also denies that he had any partnership or business relations with Anna Rafty, or with the Chicago Oyster Pail Co. He also admits that he was in the employ of the Rentz Paper Co. under his said contract with it.

The issues being made, the cause was referred to a master to take proof and report his conclusions. The master took evidence and reported, among other matters not necessary to be stated, his conclusions of fact, in substance as above stated, which report, after objections thereto were overruled, was heard before the chancellor upon the objections, which were ordered to stand as exceptions, and confirmed. The decree entered by the chancellor finds also, in addition to the above stated matters, generally, that appellant had, since he left appellee's employ, violated his said contract of February 3, 1897, with appellee by doing the things therein prohibited, and restrains and enjoins appellant for the period of ten years from directly or indirectly, either alone or with any other person, firm or corporation, as employe, stockholder, officer, manager, or otherwise, or

in an advisory capacity, setting up, following or engaging in the business of manufacturing, buying, selling, handling or dealing in paper receptacles, paper oyster pails, paper clothing boxes, folding paper boxes or paper novelties of any kind or description whatsoever, and from furnishing any person, firm or corporation with any information relating to or concerning any of said business in the States of Indiana and Illinois, and each of them; and from continuing in the employ of the Fred Rentz Paper Company, during said period in the States of Illinois and Indiana, and each of them, and from dealing in any of said goods in connection with the Chicago Oyster Pail Company, or Fred Rentz, or Anna Rafferty alias Anna Rafty, in an advisory capacity or otherwise, and from furnishing information to said Chicago Oyster Pail Company, Rentz or Rafferty, or either or any of them, relating to the business aforesaid during the period aforesaid in the States of Illinois and Indiana, and each of them. From this decree the appeal is taken.

SAMUEL J. HOWE, attorney for appellant.

The contract relied upon by appellee, is in restraint of trade, against public policy, and void. Greenhood on Public Policy, 683, and cases cited. Talcott v. Brackett, 5 Ill. App. 60; Alger v. Thatcher, 19 Pick. 51; Cobbs v. Niblo, 6 Ill. App. 60; Frazer v. Frazer Lubricator Co., 18 Ill. App. 450; Hursen v. Gavin, 162 Ill. 377; Allbright et al. v. Teas, 37 N. J. Eq. 171, Ch. 12.

The question of the validity of the contract is one of law, and hence for the court, and if appellant's contention that the contract is void is correct, the demurrer to the bill should have been sustained. Talcott v. Brackett, 5 Ill. App. 60.

CHURCH, McMURDY & SHERMAN, attorneys for appellee.

It is settled law that such contracts in restraint of trade are valid, may be enforced in equity like other contracts, and that breaches of them will be restrained by injunction on the ground that no other remedy is adequate. 3 Am. &

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Eng. Enc. Law, 885, and note. Thompson v. Andrus, 73 Mich. 557; Cowan v. Fairbrother, 32 L. R. A. 829; see also Lord Mamer v. Johnson, 1 Law Rep., Ch. Div. 673; Hodge v. Sloan, 107 N. Y. 248; Leslie v. Lorillard, 110 N. Y. 534; Tode v. Gross, 127 N. Y. 485; Oakdale Mfg. Co. v. Garst, 23 L. R. A. 641; Underwood v. Smith, 19 N. Y. Sup. 380; affirmed 135 N. Y. 661; Gibbs v. Baltimore Gas Co., 130 U. S. 409; Watertown v. Pool, 51 Hun, 162; Cowan v. Fairbrother, 32 L. R. A. 835; United States v. Addyston Pipe & Steel Co., 85 Fed. Rep. 283.

MR. PRESIDING JUSTICE WINDES, after making the above statement, delivered the opinion of the court.

It is claimed, first, that the allegations of the bill are not sufficient to sustain the decree; second, that there was error in the admission of evidence; third, that the decree is not sustained by the proof; and, fourth (which seems to be the principal contention of counsel), that the contract in question is void, as being against public policy and in restraint of trade.

The allegations of the bill and amendment thereto must be taken together in considering their sufficiency to sustain the decree. When so considered, it appears there are allegations of fact, in substance, of the matters contained in the statement preceding this opinion. They need not be here enumerated. It is sufficient that they are ample to sustain the decree to the extent that it should be sustained. The contention of appellant, that as the bill contains no allegation that any injury has accrued to appellee, or that any injury will accrue, it is, therefore, insufficient, is not tenable. The bill, as we have seen, alleges facts showing a continuing violation by appellant of his contract with appellee, and it is not essential that appellee should allege or prove that injury had or would result to it therefrom. The relief, if any, to which appellee is entitled for appellant's violation of the contract is predicated upon the reason that there is no adequate remedy at law. Damage to appellee is immaterial. 3 Pomeroy's Eq. Juris., Secs.

1342 to 1344, and cases cited in notes; 2 High on Injunctions, Sec. 1135; Steward v. Winters, 4 Sandf. (N. Y.), 587; Cowen v. Fairbrother, 32 L. R. A. 836.

2d. Numerous objections as to the admission of evidence on the hearing by the master are pressed upon our attention. Many of them are, in our opinion, well taken. They relate, however, mainly to immaterial and unimportant items of evidence, which should have been excluded by the master, but they can not affect the findings of the master nor the decree of the court for the reason that there is sufficient competent evidence in the record to justify a decree in appellant's favor. It will be presumed that the master and the court both based their conclusions upon the competent proof. Dunn v. Berkshire, 175 Ill. 243.

3d. We think the decree is, with the exceptions herein-after noted, sustained by the evidence.

The contract of appellant with appellee, which binds him for a period of ten years from Februarp 3, 1897, not to engage directly or indirectly, either alone or with any other person, firm, or corporation, as employe, stockholder, officer, manager or otherwise; or in an advisory capacity set up, follow or engage in the business of manufacturing, buying, selling, handling or dealing in paper receptacles, paper oyster pails, clothing boxes, folding paper boxes or paper novelties of any kind or description whatsoever; nor to furnish any other person, firm or corporation with any information relating to or concerning any of said business within the States of Indiana and Illinois, is admitted; and also the contract between appellant and the Rentz Paper Co., by which appellee undertakes to act as foreman and traveling salesman for the Rentz Co. for two years from March 1, 1898. He admits that he did work under this contract (and besides, it is abundantly proved) for the Rentz Co. The business of the Rentz Co., as testified to by the witness Rentz, and not denied, is that of dealing in all kinds of wrapping papers, paper sacks, a general line of store supplies for bakers, grocers and butchers, wrapping paper bags, oyster pails, ice cream pails, most all description of boxes,

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whatever orders come into it, suit boxes, and paper novelties sold in boxes.

It is also shown by the clear preponderance of the evidence, that said Rentz and Rafty, from about March 1, 1898, up to the filing of the bill, were engaged in a like business to that of the Rentz Co., under the name of the Chicago Oyster Pail Co., and that appellant was in their employ during that time.

Both these employments of appellant constitute a direct violation of appellant's contract with appellee. The consideration named in the contract, to wit, the purchase by appellee of appellant's interest in the business of the Lanzit Manufacturing Company, and his employment by appellee at the salary stated, are good and valuable considerations, and sufficient to support the contract.

4th. The claim that this contract—in so far as it applies to the States of Indiana and Illinois—is void as against public policy and in restraint of trade, is not, in our opinion, tenable.

In Cobbs v. Niblo, 6 Brad. 60, relied on by appellant, Mr. Justice Wall, speaking for the court (Fourth Dist.), says:

“The law is well settled that parties may make a valid agreement in restraint of trade where the operation of the agreement is partial and limited under reasonable conditions, and where it is supported by a valid consideration. The contract must be construed by the court, and its reasonable character determined.”

In Talcott v. Brackett, 5 Brad. 60–67, also relied upon by appellant, this court, by Mr. Justice McAllister, said: “If the contracts are based upon a good and valuable consideration, and the limitation is reasonable, which is a question of law for the court, they are upheld and enforced.”

In Hursen v. Gavin, 162 Ill. 377, cited by appellant, in which the court sustained a contract by which the retiring member of a firm engaged in the undertaking and livery business agreed not to engage in such business within the limits of Chicago for the period of five years, this language was used, viz.:

"A contract in restraint of trade is thus total and general when by it a party binds himself not to carry on his trade or business at all, or not to pursue it within the limits of a particular country or State. Such a general contract in restraint of trade necessarily works an injury to the public at large and to the party himself in the respects indicated and is, therefore, against public policy."

This statement was, we think, unnecessary to a decision of the case before the court, because the contract under consideration had reference only to a livery and undertaking business which had been and was to be carried on within the limits of the city of Chicago, and necessarily purely local in its nature.

The court also further says, citing authorities:

"But a contract which is only in partial restraint of trade is valid, provided it is reasonable and has a consideration to support it. The restraint is reasonable when it is such only as to afford a fair protection to the interests of the party in whose favor it is imposed."

The court also cites with approval cases holding that contracts of this nature are divisible—a part being held to be valid and a part void because of unreasonable restraint as to time or territory, or both. See Pelz v. Eichele, 62 Mo. 171; Gill v. Ferris, 82 Mo. 156, and Dean v. Emerson, 102 Mass. 480.

A recent and carefully considered case is Cowan v. Fairbrother, 32 L. R. A. 829, decided by the Supreme Court of North Carolina, in which it was held that a contract not to edit, print or conduct a newspaper, or be in any wise connected with one in that State, was valid. The court says:

"The older cases in which the courts attempt to fix arbitrarily geographical bounds, beyond which a contract to forbear from competition would not be enforced, have given way to the more rational idea of making every case dependent upon the surrounding circumstances, showing the extent as to time and territory of the protection needed. * * * Where the nature of the business was such that complete protection could not be otherwise afforded, the restraint upon the right to compete has been held good in one or more instances where it extended throughout the world and in other cases where it applied to a State, or to a bound-

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ary including several States, and cites, in support of its holding, a number of recent English and American cases, among which was one in which it was held that a restriction applying to the entire Kingdom of Great Britain was justifiable, and another in which it was said that in the case of periodical publications which have a wide circulation, a restriction is valid which shall be as wide as the interest of a purchaser requires, ‘though it may cover the whole of a State or the whole country.’”

In a recent case the Supreme Court of Rhode Island (Oakdale Mfg. Co. v. Garst, 23 L. R. A. 641) said :

“The test of reasonableness is the test of validity in contracts of this kind. The test is to be applied according to the circumstances of the contract, and is not to be arbitrarily limited by boundaries of time or space.” * * * “The contract is to be determined by its subject-matter and the conditions under which it was made, by considerations of extensiveness or localism of protection to interests sold and paid for, of mere deprivation of public rights for private gain, of proper advantage on one side, or useless oppression on the other.” * * * “No limitation of foreign countries could be made in advance, for the company was to seek its markets.”

In Gibbs v. Baltimore Gas Co., 130 U. S. 409, it was said :

“Public welfare is first considered, and if it be not involved, and the restraint upon one party is not greater than protection to the other party requires, the contract may be sustained. The question is whether, under the particular circumstances of the case, and the nature of the particular contract involved in it, the contract is or is not unreasonable.”

In Diamond Match Co. v. Roebor, 106 N. Y. 477, a contract was upheld by which it was agreed not to directly or indirectly engage in the manufacture or sale of friction matches, except as agent or employe of two named companies, anywhere within the United States or Territories, except in Nevada and Montana, for the period of ninety-nine years. The court say:

“The boundaries of the States are not those of trade and commerce, and business is restrained within no such limit. The country, as a whole, is that of which we are citizens,

and our duty and allegiance are due both to the State and Nation. Nor is it true, as a general rule, that a business established here can not extend beyond the State, or that it may not be successfully established outside the State. There are trades and employments which, from their nature, are localized; but this is not true of manufacturing industries in general. We are unwilling to say that the doctrine as to what is a general restraint of trade depends upon State lines."

Also a contract as to manufacturing and selling type-writer supplies, with a time limitation of fifteen years, and no limit of space, the defendant's entire business not being sold, was held to be valid in *Underwood v. Smith*, 19 N. Y. Sup. 380, and was affirmed 135 N. Y. 661.

As we have seen, appellee's selling business was largely carried on in both the States of Indiana and Illinois, and all its manufacturing was done in those States, its business being largely transacted from its office in Chicago, all of which was well known to appellant when he made his contract with appellee.

There is no showing of any special facts or circumstances from which it can be said that the limitation of ten years is oppressive upon appellant, nor the limitation as to the States of Indiana and Illinois. Appellant is a printer by trade, and not confined to his business to earn his living. The latter limitation is separable from the broader one as to the United States. (Missouri and Massachusetts cases, *supra*.) No question of injury to the public is involved. The nature and extent of appellee's business is such that a reasonable and complete protection of it from appellant's competition could not be afforded with less than a prohibition throughout the States of Illinois and Indiana.

All the circumstances in evidence considered, we are of opinion that both the limitations as to time and to the States of Indiana and Illinois are reasonable, and, as was held in the *Hursen* case, 162 Ill., *supra*, the contract, being only in partial restraint of trade, and having a consideration to support it, is valid, and it should be enforced.

The only remaining question is as to the extent to which it should be enforced.

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The business of the Rentz company and the Chicago Oyster Pail Company is similar to that of appellee, one part of which is the manufacture and sale of paper novelties at the time when appellant's contract was made, February 3, 1897, but the proof is that it did not make any paper novelties except certain ones specifically mentioned in the statement preceding this opinion, in which the nature and extent of appellee's business is stated. It is contended that the decree is too broad, in that it prohibits appellant from engaging in the business of manufacturing or dealing in paper novelties of any kind or description whatsoever. He is bound by his contract to refrain from just such business and he can not now contend that the decree should be limited in this respect to the particular items which appellee was then engaged in manufacturing and selling. The inference, from the contract, is reasonable that appellee, as well as appellant, then had in contemplation an extension of appellee's business to other paper novelties, besides those then made and sold by it. The decree in this respect should stand. We are of opinion, however, that the decree is too broad in that it restrains appellant from continuing in the employ of the Rentz Paper Co. for the period of ten years in the States of Indiana and Illinois. This is not justified by appellant's contract nor the evidence, and the decree should be modified so as to restrain appellant from continuing in such employment during said period, while said company shall be engaged in said prohibited business. Should the Rentz company engage in some other than the prohibited business, it would be unjust to prohibit appellant from taking employment from it.

The decree is affirmed, except as herein indicated, and in that respect it is reversed, with directions to the Superior Court to modify the same in accordance with the views expressed. Each party will pay his costs in this court.

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83 182 | Adolph Arnold, Herman Arnold, Theodore Arnold and
94 463 | Benjamin F. Baker v. Louis Pucher.

1. INSTRUCTIONS—*As to the Weight of the Evidence.*—An instruction upon the weight of the evidence which singles out a particular witness and applies to him a rule, which should have been made to apply, if at all, to others, who were witnesses in the case as well, is properly refused.

Assumpsit.—Common counts. Trial in the Superior Court of Cook County; the Hon. JONAS HUTCHINSON, Judge presiding. Verdict and judgment for plaintiff; appeal by defendant. Heard in this court at the October term, 1898. Affirmed. Opinion filed May 22, 1899.

ESCHENBURG & WHITFIELD and SAMSON & WILCOX, attorneys for appellants.

HENRY M. COBURN, attorney for appellee.

Statement of the Case.—Appellee sued appellants and two others, Howe and Bodenschatz, as copartners in a banking business. The copartnership was formed in 1893. In 1895 it was dissolved by the withdrawal from the firm of appellants, Howe and Bodenschatz continuing the business. Appellee became a depositor in the bank of the copartnership in 1895. Prior to the withdrawal of appellants from the firm he had deposited \$300. After the change in the firm he deposited \$200 more. The facts as to the change in the copartnership and the manner in which the business was continued appear here substantially as they appeared in Arnold v. Hart, reported in 75 Ill. App. 165, and they are more fully set forth in the report of that case. Appellee claimed to have had no notice or knowledge of the change in the firm, and to have continued his deposits upon the faith of the credit and joint liability of the original firm. Trial was had with a jury, which resulted in verdict for appellee. From judgment upon that verdict this appeal is prosecuted.

MR. JUSTICE SEARS delivered the opinion of the court. Questions arising on this appeal are, for the most part,

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settled by the decision in *Arnold v. Hart*, 75 Ill. App. 165, affirmed in 176 Ill. 442.

It is, however, urged that, conceding the propriety of the verdict and judgment as to the amount of the deposits made before the change in the copartnership, yet as to the \$200 deposited thereafter, the verdict was improper, because it appeared that appellee had no acquaintance with or knowledge of Baker, one of the old firm, at any time during the making of the different deposits. Hence, it is argued, he could not have continued his relationship as a depositor with the new firm upon the faith of any connection of Baker with it, of whom he knew nothing. We think the contention untenable. The liability of all the members of the old firm for the deposits made before the change in the firm is unquestioned, and it is irrespective of whether appellee, who dealt with the firm, knew the individuals comprising it or not. He dealt with the firm as an entirety, and presumably upon the credit which attached to it as an entirety, including all its members. This liability simply continued, unaffected by any change in the firm, because appellee is not chargeable with notice or knowledge of such change. Baker was an ostensible, not a secret or dormant partner. His name appeared in the firm name.

We view the evidence as sufficiently supporting the allegations that appellee had no notice or knowledge of the change in the copartnership, and that he continued his business with the continuing partners in reliance upon the belief that his money was deposited with all of the original firm. The statement in the affidavit for a continuance that Bodenschatz would testify that "the change in the proprietorship of the bank became generally known in the vicinity of the bank within a week thereafter," was properly excluded, as being a conclusion of the witness.

The remaining question is as to the ruling of the court in refusing the following instruction:

"The jury are instructed that, in weighing the plaintiff's evidence, you should take into consideration his interest in this suit, and what effect, if any, such interest is likely to have upon his testimony, and give his testimony such

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weight and credit as you think, under all the circumstances, it is entitled to."

We are of opinion that this instruction was properly refused. It is bad, because it singles out a particular witness and applies to him a rule which should have been made to apply, if at all, to others as well, viz., the defendants who were witnesses in the case. *Phoenix Ins. Co. v. LaPoint*, 118 Ill. 384; *Penn. Co. v. Versten*, 140 Ill. 637; *Parlin et al. v. Finfrouck*, 65 Ill. App. 174.

It is true that instructions somewhat similar to the one here in question have been approved in *W. C. St. Ry. Co. v. Estep*, 162 Ill. 130, and *W. C. St. Ry. Co. v. Dougherty*, 170 Ill. 379.

But in neither the *Estep* case, nor the later *Dougherty* case, does the Supreme Court expressly overrule the doctrine as to the vice of singling out a particular witness in an instruction, announced in the *Versten* case and others cited *supra*. As applied to the evidence in the *Dougherty* case and in the *Estep* case, the instruction may have been proper, for each being a suit against a corporation, it may well have been that no one other than the plaintiff was a witness who could have been said to have been an interested witness. No objection to the instruction, because it singled out a particular witness, seems to have been raised or considered in either of those cases. But in the case under consideration there were defendants who testified, as well as the plaintiff, and the same statute operated to remove their disability as witnesses, and made their interest a matter for the consideration of the jury. The instruction should have applied the rule to the defendants as well as to the plaintiff, and it being vicious in that it applied it to the plaintiff only, thereby improperly singling him out to the jury, the trial court was justified in refusing to give it.

The judgment is affirmed.

Gilbert v. Schilz.

Henry D. Gilbert and William Stevenson v. Frank Schilz.

1. **PRACTICE—New Trials—Waiver.**—If either party wishes to move for a new trial, he must file his points in writing (R. S., Ch. 110, Sec. 57), and if the opposite party fails to call for such points in writing he will be held to have waived them.

2. **NEW TRIALS—Appellate Court Practice.**—Where a party applying for a new trial files his points in writing, he will be confined, in the Appellate Court, to the reasons specified in his motion, and will be held to have waived all causes for a new trial not set forth.

3. **APPELLATE COURT PRACTICE—Insufficient Abstracts.**—Unless errors appear in the abstract there can be no reversal.

Assumpsit, on a promissory note. Trial in the Circuit Court of Cook County; the Hon. RICHARD S. TUTHILL, Judge, presiding. Finding and judgment for plaintiff; appeal by defendant. Heard in the Branch Appellate Court at the October term, 1898. Affirmed. Opinion filed May 26, 1899.

FRANKLIN L. CHASE and LEVI A. ELIEL, attorneys for appellants.

MORSE, Ives & TONE, attorneys for appellee.

MR. JUSTICE HORTON delivered the opinion of the court. A judgment was entered in this case upon a promissory note made by appellants and payable to the order of appellee. This appeal is prosecuted to reverse that judgment. The statute requires that if either party wishes to move for a new trial he must file the points therefor in writing. (R. S., Ch. 110, Sec. 57.) If the opposite party fail to call for such points in writing he will be held to have waived them. But if a party file his points in writing he will be confined, in this court, to the reasons specified therein, and will be held to have waived all causes for a new trial not set forth in his written grounds. O. O. & F. R. V. R. Co. v. McMath, 91 Ill. 104, 111.

There is no abstract of a motion for a new trial. In one place we read in the printed abstract these words: “Mo-

tion for new trial made and overruled," and in another place these: "Motion for new trial and reasons in writing therefor." What the points or reasons assigned are, if any, for new trial, is nowhere shown in the abstract. Neither does it thus appear that there was any exception to the ruling of the court upon such a motion. It may be, so far as said abstract shows, that no point made in the assignment of errors was made in the motion for a new trial. Unless errors appear in the abstract there can be no reversal. We need not here repeat what is said in Amundson Printing Co. v. Empire Paper Co. (No. 7836, in this court), but refer to the opinion in that case and to cases there cited.

While, as there stated, this is not a satisfactory mode of disposing of a case, yet from what we can learn from said abstract, and upon the briefs in the case, we do not feel that any injustice is here being done.

The judgment of the Circuit Court is affirmed.

'McNeil & Higgins Co. v. Plows & Co.

1. ATTACHMENT—*Fraudulent Conveyance of Property—Proof.*—In order to sustain an attachment where the grounds relied upon are that defendant within two years fraudulently conveyed his effects so as to hinder and delay his creditors, actual fraud, or fraud in fact, as distinguished from constructive fraud, must be shown.

2. FRAUD—*As Grounds for Attachment—Proof.*—Actual fraud may be proven by facts and circumstances from which the inference of fraud would be natural and probable, and would be presumed. The mind should be convinced from the proof that the fraud charged had been perpetrated, although there might remain some doubt.

3. FRAUDULENT CONVEYANCES—*Where Secrecy is a Part of the Consideration.*—Where an agreement is made that "the transaction is to be kept secret until the debtor has an opportunity of escaping beyond the reach of process used by his other creditors, or by which the deed is not to be offered for record until the other creditors threaten suit, will render it fraudulent. Secrecy, in such cases, is a part of the consideration, and transactions contaminated by it ought not to be regarded as bona fide.

4. SAME—*Where a Conveyance is Withheld from the Record.*—Where the conveyance is withheld from the record, so that it may not affect

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the financial standing of the grantor, the evidence of fraudulent intent becomes express.

Assumpsit.—Attachment in aid. Trial in the Circuit Court of Cook County: the Hon. JOHN C. GARVER, Judge, presiding. Finding and judgment for defendant on the attachment issue; appeal by plaintiff. Heard in this court at the October term, 1898. Reversed and remanded. Opinion filed June 12, 1899.

Statement of the Case.—Appellant begun suit in assumpsit against appellee, a corporation, January 15, 1898, for merchandise and goods sold and delivered to appellee at its request, and on the same day an attachment in aid was issued and levied on certain personality. The grounds of the attachment were that “said defendant has, within two years last past, fraudulently conveyed or assigned its effects, or a part thereof, so as to hinder and delay its creditors,” and that “said defendant has, within two years last past, fraudulently concealed or disposed of its property so as to hinder and delay its creditors, and is about fraudulently to sell, assign or otherwise dispose of its property or effects so as to hinder and delay its creditors.”

Plaintiff had judgment by default on the merits for \$399.63, but a plea was filed traversing the facts alleged in the affidavit for attachment. At the close of the plaintiff’s evidence, on a trial of this issue before the court and a jury, on motion of defendant, the court instructed the jury to find the attachment issue for defendant, which was done, and a judgment was rendered on the verdict, from which this appeal is taken.

The evidence shows that in April, 1897, the defendant was largely insolvent, and during all the period of time involved in the evidence, or covered by the transactions brought in question in this case, the defendant was insolvent; that on the 28th of April, 1897, the defendant was indebted to one Richter in the sum of \$3,000, being an unpaid balance of a loan of \$5,000; and that on that day the defendant executed to Richter a bill of sale of all its stock, fixtures and utensils located in the candy department and stock room of Plows & Co., at 263 State street, Chicago,

Illinois, worth \$4,200; that by agreement between Richter and the officers of the defendant, this bill of sale was left with one Edward Glickauf in escrow, and a resolution of the board of directors was duly adopted providing therefor, and it was agreed further that the existence of this bill of sale should be kept secret, and that in case of any danger to Mr. Richter by reason of any other creditors of Plows & Co. pushing their claims, or trying to force things, Mr. Richter was to be handed these documents and take possession of Plows & Co.'s goods, etc., at the Rothschild's store, 263 State street, Chicago; that the officers of the defendant agreed to notify Glickauf, who held the bill of sale in escrow, of any danger, and he was then to turn the papers over to Mr. Richter; that the indebtedness secured in this manner was finally fully paid in October, 1897, out of the proceeds of sale of the department at Rothschild's; that in April, 1897, the defendant company negotiated a loan from one Stephen L. Bartlett, of the sum of \$5,000, to be secured by chattel mortgage, and upon the presentation of this document to the president, Hopkins, he refused to sign the same, unless it was agreed that it should be held off from the record, or held in escrow, and Hopkins also testified that he was afterward given the assurance that Bartlett, the mortgagee, had agreed to that, and that he signed the note and mortgage on those conditions; that they were to be held in escrow, himself, Mr. Brown and Mr. McQuiston (two other directors and officers of the defendant corporation) assuring Mr. Cutter, Bartlett's agent, "that in event of any of Plows & Co.'s creditors attempting to push their claims, which would be liable to force an issue, that he would be notified immediately, that these papers might be placed on record to protect Mr. Bartlett;" that this was consented to on the part of Bartlett and his agent, and the papers were thereupon delivered.

The president of the company testified, in respect to the bill of sale given to Richter, that it was agreed "that in case any of Plows & Co.'s creditors attempted to take possession, or bring any suits which were liable to invalidate

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Richter's claim, he would be notified," and "that Mr. Richter and the man who held it in escrow were asked to keep it secret and not to file it for record."

The evidence further shows that the plaintiff (appellant) was first informed of these transactions on the day before it issued its attachment, and that all of the goods sold by plaintiff to defendant had been sold subsequent to the first of May, 1897; that is, all the goods had been sold without any knowledge of either of these transactions. The \$5,000 mortgage to Bartlett was placed on record the same day the attachment was begun, to wit, January 15, 1898, at 3:30 P. M., whether before or after the attachment does not appear.

FLOWER, SMITH & MUSGRAVE, attorneys for appellant.

An agreement to keep a security secret and to use it only when other creditors seek to enforce their claims, coupled with an agreement by the debtor to advise the holder of the security in case any other creditors should push their claims, is within the express terms of the statute, the necessary effect being to hinder and delay such other creditors. Hurd's Stat. 1897, p. 1875, Sec. 1, Cl. 7; Stockgrowers Bank v. Newton, 22 Pac. Rep. 447; Haas v. Sternbach, 156 Ill. 44; Sternbach v. Leopold, 50 Ill. App. 476; Farguson v. Johnston, 36 Fed. Rep. 134; Weber v. Mick et al., 131 Ill. 520; Blennerhassett v. Sherman, 105 U. S. 100.

It being proven that the defendant procured from the grantees in the bill of sale and chattel mortgage an agreement that the instruments should be kept secret unless other creditors should attempt to push their claims, the intent of the defendant in making the documents was a question for the jury. Sternbach v. Leopold, 50 Ill. App. 476; Seals v. Robinson, 75 Ala. 363 (372); Weber v. Miek, 131 Ill. 526; Folsam v. Clemence, 111 Mass. 273 (277); Silvis v. Oltmann, 53 Ill. App. 392; Home Ins. Co. v. Field, 53 Ill. App. 119; Edson v. Hudson, 47 N. W. Rep. 347; Reed v. Noxon, 48 Ill. 323.

While fraud must be proven, nevertheless, it is proven

when facts and circumstances are shown by the evidence from which the inference of fraud is natural and irresistible. *Reed v. Noxon*, 48 Ill. 323; *Bullock v. Narrott*, 49 Ill. 62; *Draper v. Draper*, 68 Ill. 17; *Schumacher v. Bell*, 64 Ill. 181

MILFORD J. THOMPSON, attorney for appellee.

MR. PRESIDING JUSTICE WINDES delivered the opinion of the court.

The only question presented is whether there was sufficient evidence of actual fraud to have required the submission of the case to the jury. In order to sustain an attachment under our statute there must be shown actual fraud, or fraud in fact, as distinguished from constructive fraud. *Weare v. Druley*, 156 Ill. 25, and cases cited.

But such actual fraud may be proven by facts and circumstances from which the inference of fraud would be natural and probable, and would be presumed. The mind should be convinced from the proof that the fraud charged had been perpetrated, although there might remain some doubt. *Schumacher v. Bell*, 164 Ill. 181-3, and cases cited.

In *Sternbach v. Leopold*, 50 Ill. App. 476-94, in which there was a question as to whether fraud in fact was shown, this court, while it held that the evidence in the record was insufficient to show fraud in fact, quoted with approval from the Supreme Court of Indiana in *Hutchinson v. First Nat. Bank*, 30 N. E. Rep. 952, citing many cases, viz.:

"We are satisfied that an agreement for the withholding of a mortgage from the record is not of itself sufficient to justify a court in holding, as a matter of law, such mortgage fraudulent and void as to creditors, either existing or subsequent, but that it is a badge of fraud, to be considered with all the other facts and circumstances surrounding the transaction, in determining whether or not there was in fact a fraudulent intent."

The case was affirmed by the Supreme Court (*Haas v. Sternbach*, 156 Ill. 44-55), in which it is said:

"While the unsworn answer of Henry Leopold sets up conversations between himself and Charles Sternbach relative to keeping the mortgage off record and

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concealing it from others, which, if true, would establish a wicked conspiracy to defraud creditors by giving a false credit to himself and his firm, his own testimony does not support these allegations."

From an examination of the abstract and of the answer referred to in that case in this court, we find statements which make the case in point of fact quite similar to the case at bar, and we regard the language of the Supreme Court, when considered with reference to the statements of the answer, as deciding that where a party takes a mortgage and keeps it off record in order to support the credit of the maker, upon the condition or agreement that the maker shall keep him informed of his affairs, so that if any trouble is likely to arise with the maker's creditors the grantee can place his mortgage upon record, such a transaction is a fraud in fact. See also Weber v. Mick, 131 Ill. 520-6.

In Wait on Fraudulent Conveyances, Sec. 234, the author says that an agreement that "the transaction is to be kept secret until the debtor has an opportunity of escaping beyond the reach of process used by his other creditors, or by which the deed is not to be offered for record until the other creditors threaten suit, will render it fraudulent. Secrecy in such cases is a part of the consideration; the transaction is contaminated by it, and ought not to be regarded as *bona fide*." The statement of the author is supported in principle by the following cases, viz.: Farguson v. Johnston, 36 Fed. Rep. 134; Blennerhassett v. Sherman, 105 U. S. 100-117; Seals v. Robinson, 75 Ala. 363-72; Stockgrowers Bank v. Newton (Colo.), 22 Pac. Rep. 444.

In the Newton case, *supra*, the court holds that where the conveyance is withheld from the record, "so that it may not affect the financial standing of the grantor, the evidence of fraudulent intent becomes express." So, in the case at bar, the evidence being that there was an agreement between Richter and appellee that the bill of sale was to be kept secret, and that in case other creditors should push their claims and that the party holding it in escrow should be notified of any danger in that regard he should turn it over to Richter and he should take possession under it,

also that there was an agreement between appellee and Bartlett's agent that if appellee's creditors attempted to push their claims he should be notified immediately so that the Bartlett mortgage might be placed on record, and that the mortgage was given only upon that express understanding between the parties, and also that during all this time appellee was insolvent, we are of opinion these facts and circumstances tended to show actual fraud, and the question as to whether this evidence did or did not show fraud in fact should have been submitted to the jury.

The judgment on the attachment is therefore reversed and the cause remanded.

West Chicago St. R. R. Co. v. Joseph Loftus, by his Next Friend.

1. INSTRUCTIONS — *Technical Inaccuracies. Not Reversible Error.*
When.—An instruction containing technical inaccuracies, but which is not in the main calculated to mislead the jury, is not erroneous.

Action in Case, for personal injuries. Trial in the Superior Court of Cook County: the Hon. SAMUEL C. STOUGH, Judge, presiding. Verdict and judgment for plaintiff; appeal by defendant. Heard in this court at the October term, 1898. Affirmed. Opinion filed June 12, 1899.

Statement of the Case.—Appellee, a boy about thirteen years of age, engaged in selling newspapers on the streets of Chicago, was injured by being pushed from one of appellant's cars on September 14, 1895, brought suit for his injuries, and on a trial before the Superior Court of Cook County and a jury, recovered a verdict for \$2,500, on which judgment was entered, from which this appeal is taken.

The negligence charged is that appellant's conductor, while in charge of its car, and acting within the scope of his employment, while plaintiff was riding upon the car and acting with all due care and diligence for his own safety,

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pushed, kicked and knocked the plaintiff from said car while the same was moving, and plaintiff fell to and upon the ground, by means of which he was injured, etc.

It appears from the evidence that plaintiff, between seven and nine o'clock A. M., on the day in question, got upon a train of appellant, two cars, consisting of an electric motor and one trailer, for the purpose of selling a paper to one of the passengers thereon who had called to plaintiff while he stood on the sidewalk near the car tracks; that plaintiff got upon the running board of either the motor or the trailer while the train was stopped for receiving and discharging passengers; that the train started before he had sold his paper, and while it was moving, plaintiff was either pushed from the car by the conductor or in attempting to jump from the car fell and was injured.

The plaintiff testified in part, viz.:

"I was standing on the southwest corner of Lake and Western avenue and the car was going south, and a man on the car called me to buy a paper, and the car stopped, and the passengers was getting on and off the car, and I went to give the man the paper, and the conductor came along and shoved me off, and that's all I remember."

He is corroborated by two eye-witnesses of the accident, Kenney and Lang, who seem to be disinterested and credible.

The conductor of the motor car testified in part, viz.:

"As we were crossing Lake street I was at the trolley cord, at the rear end of the car. Then when the car stopped I stayed right at the trolley cord. When the car started again, I started up the aisle to get the fares. I went up about two seats. There was a newsboy on the left side of the car, and he jumped off of my car when he seen me coming up the aisle. This boy was about at the second seat from the front end of my car. When he jumped off he was in the same place. He was facing south. I was coming from the rear end of the car toward him. He jumped off my car and got off all right, and then he started and jumped on the trail car, and he got upon the footboard all right. I watched the boy just after he left my car and he jumped on the other one, and he got on the footboard and the momentum of the car throwed him with his feet

toward the south and the consequence was he struck on his head when he landed on the pavement."

He also testified that the train was going about five miles an hour when the boy fell, and that he did not strike or push the boy or put his hands on the boy's person.

The conductor of the trail car testified in part, viz.:

"I was the conductor on the trail car. We stopped on the north side of Lake; that is, before crossing over. I did not see the boy at any time before the accident happened. I first saw the boy as he was attempting to get on my car. The conductor of the motor car was William Hayen. The motorman was Frank Matthews. It was between seven and eight o'clock. We were going south. We had very few passengers aboard our car. When I first saw the boy it was just before we got to the alley. I saw him try to jump on—about the front seat. My car was an open car with footboard on the side; an aisle through the center. He didn't succeed in getting on; he fell in attempting to. He attempted to get on and missed his hold and fell."

* * * "He made a grab for the handles of the car and missed them, of course. He made a grab for the grab-irons and fell, and the next instant he was on the ground; just as a person would naturally make a grab, and, for instance, raise their foot like that (illustrating) to get on. I couldn't say whether he got his feet on the footboard or not. He fell with his head toward the north."

He also testified that when plaintiff attempted to jump on, the car was moving, but couldn't say how fast; also, viz.:

"I did not at any time there put my hand upon the boy or push him off. I did not make any threatening gestures toward him. I did not order him off. I did not do anything to make him fall."

The evidence of the conductors is corroborated by two apparently disinterested and credible witnesses.

Among other instructions given for the plaintiff were the following :

"4. The court instructs the jury that while, as a matter of law, the burden of proof is upon the plaintiff to prove his case by a preponderance of the evidence, still if the jury find that the evidence bearing upon the plaintiff's case preponderates in his favor, although but slightly, it would be sufficient for the jury to find the issues in his favor.

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“6. The plaintiff holds the affirmative of the issue, or what is called the burden of proof rests upon him, the defendant having denied the charges alleged against it in the declaration. The plaintiff must satisfy you, by what is called a preponderance of the proof, that the wrong complained of was committed by the servant of the defendant in manner and form as charged in the declaration. By a preponderance of proof the court does not mean the larger number of witnesses on a given point. Four or five witnesses may testify to a fact, and a single witness may testify to the contrary, but under such circumstances and in such manner and with such an air and appearance of truth and candor as to make it the more satisfactory or convincing to you that the one witness, with the opportunity of knowing the facts testified to, has told the truth of the matter. When you are thus satisfied that the truth lies with a single witness or any other number, you are justified in returning a verdict in accordance therewith. This is what is meant by a preponderance of proof. It is that character or measure of evidence which carries conviction to your minds.”

ALEXANDER SULLIVAN, attorney for appellant; EDWARD J. McARDLE, of counsel.

THOMAS S. HOGAN and MUNSON T. CASE, attorneys for appellee.

MR. PRESIDING JUSTICE WINDES, after making the foregoing statement, delivered the opinion of the court.

It is claimed the verdict is against the law and evidence and the weight of the evidence, and that it was error to give plaintiff's fourth and sixth instructions, as stated above. It is true that there are some differences as to the circumstances and details testified to by the witnesses Kenney and Lang, which tend to weaken the force of their evidence. They need not be set out in detail, as we are of opinion they are insufficient to seriously affect their evidence, and because the weight to be given the evidence of the witnesses was for the jury. The appellant contends that the plaintiff is wholly unsupported, but we can not say, from a careful reading of the evidence, in the light of the arguments, that

the jury was not justified in believing that of appellee and his witnesses as against that of appellant's witnesses, and in finding that appellee was pushed by the conductor from the car while it was moving. This being our conclusion, it follows, the case was properly submitted to the jury and the verdict should stand, unless there was error in the instructions, that being the only other assignment of error argued by appellant.

It is said that the fourth instruction excludes from the consideration of the jury all the evidence introduced by appellant, because it tells the jury that if they "find that the evidence bearing upon the plaintiff's case preponderates in his favor, although but slightly, it would be sufficient for the jury to find the issues in his favor." We think the instruction is not fairly open to the criticism made. It was held that there was no valid objection to the same instruction in *Taylor v. Folsing*, 164 Ill. 332-5. See also *W. C. St. R. R. Co. v. Karzalkierwiecz*, 75 Ill. App. 240. The sixth instruction of plaintiff is criticised because, it is claimed, it singles out the plaintiff, and tells the jury, in substance, they may find their verdict on his unsupported testimony. We can not assent to this contention. The instruction may as well apply to either of appellant's conductors as to plaintiff.

In *N. C. City Ry. Co. v. Gastka*, 27 Ill. App. 518-23, this instruction was held not to be erroneous, and this decision was affirmed by the Supreme Court, 128 Ill. 613, the court saying :

"The instructions may contain technical inaccuracies, but, in the main, we regard them as correct. They contain nothing calculated to mislead the jury."

There being, in our opinion, no reversible error in the record, the judgment is affirmed.

Glos v. Dawson.

Jacob Glos and Philip Knopf, County Clerk, v. John B. Dawson.

1. **EQUITY PRACTICE—Enjoining the Issue of Tax Deeds.**—A bill to enjoin the issuing of a tax deed and to obtain a surrender of a tax certificate is not to be treated as a bill to quiet a title or to remove a cloud from the title.

2. **SAME—Party Out of Possession Can Not Maintain Bill to Quiet Title.**—A party out of possession can not maintain a bill in chancery to quiet title, but he can bring an action at law to test the title, which ordinarily, a party in possession can not do.

3. **SAME—Decrees Enjoining Tax Deeds — Requisites.** — A decree enjoining the issue of a tax deed which grants relief to the complainant but allows him to escape from the consequences of a sale for a valid tax resulting from his lack of effort to make payment on his part, without requiring, as a condition to such relief, that he pay the moneys expended in purchase, payment of taxes, costs, interest, etc., is erroneous.

4. **Costs—Setting Aside Tax Deeds.**—Where there is no allegation in a bill to set aside a tax deed of a tender made to the holder of the certificate, of the amount due for redemption before the commencement of the suit, the payment of the costs of the suit should be imposed upon the complainant.

Bill to Enjoin the Issue of a Tax Deed.—Trial in the Superior Court of Cook County; the Hon. HENRY V. FREEMAN, Judge, presiding. Decree for complainant; appeal by defendant. Heard in this court at the October term, 1898. Reversed and remanded. Opinion filed June 12, 1899.

ENOCH J. PRICE, attorney for appellants.

It has been the rule of chancery in this State from the very first that a claim resting on a tax sale will not be set aside without repayment of the amount paid by the holder, for such claim with costs and interest. Alexander v. Merrick, 121 Ill. 606; Mecartney v. Morse, 137 Ill. 532; Gage v. Goudy, 141 Ill. 215; Brophy v. Taylor, 30 Ill. App. 261.

The Supreme Court of this State very early established the rule that chancery setting aside tax sales or deeds would require the complainant to pay all costs, both his own and defendant's, in the absence of a showing of a sufficient tender made, and refused by the defendant before coming into

court. This rule has never been departed from to our knowledge. Gage v. Busse, 102 Ill. 592; Gage v. Arndt, 121 Ill. 495; Mecartney v. Morse, 137 Ill. 481; Brophy v. Taylor, 30 Ill. App. 261; Glos v. Goodrich, 175 Ill. 20.

HARRY L. IRWIN, attorney for appellee.

MR. JUSTICE SEARS delivered the opinion of the court.

Appellee filed his bill of complaint in this cause to enjoin the issuing of a tax deed to appellant Glos, and to obtain a surrender of a tax certificate issued to him. The ground upon which relief is prayed is a failure to comply with the requirements of the statute as to notice after the sale and before issuing of tax deed.

Appellant Glos demurred to the bill of complaint. The Superior Court overruled the demurrer and entered a decree *pro confesso* granting to appellee the relief prayed.

Appellant contends that the demurrer should have been sustained, because the bill of complaint does not allege that the land in question was at the time of filing the bill in possession of complainant, or that it was unimproved and unoccupied. For all that appears by the bill of complaint, the land may have then been in the adverse possession of others than the complainant. Counsel for appellant cite in support of this contention, Comestock v. Hennebery, 66 Ill. 212; Hardin v. Jones, 86 Ill. 313; Gage v. Abbott, 99 Ill. 366; Oakley v. Hurlbut, 100 Ill. 204; Wetherell v. Eberle, 123 Ill. 666; Johnson v. Huling, 127 Ill. 14; Glos v. Randolph, 133 Ill. 197; Glos v. Hewes, 69 Ill. App. 75.

If this were a bill solely to quiet title or to remove a cloud from the title, then under the provisions of the statute and the decisions above cited, there could be no doubt as to the correctness of the contention. But this bill seeks to enjoin the county clerk, appellant Knopf, from issuing a tax deed, and to compel appellant Glos to surrender the certificate of sale for cancellation. By the decision in Gage v. Parker, 103 Ill. 528, it is held that a bill of complaint praying for such relief is not to be treated as a bill to quiet title or to remove a cloud from the title.

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The reason of the rule that a party out of possession can not maintain a bill in chancery to quiet title is, that he may bring an action at law to test the title, which, ordinarily, a party in possession can not do. *Comestock v. Hennebery*, *supra*.

The statute has modified this rule as to the lands which are unimproved and unoccupied. But here no suit at law could avail to prevent the issuing of the tax deed.

There is, however, another and sufficient reason why the decree must be reversed. It is erroneous, in that it grants relief to appellee by allowing him to escape from the consequences of the tax sale, which appears to have been for a valid tax, and to have resulted from utter lack of effort to make payment on his part, without requiring of him, as a condition to such relief, that he pay to appellant Glos the moneys expended by him in purchase, payment of taxes, costs, interest, etc. This was error. *Reed v. Taylor*, 56 Ill. 288; *Phelps v. Harding*, 87 Ill. 442; *Farwell v. Harding*, 96 Ill. 32; *Moore v. Wyman*, 107 Ill. 192; *Gage v. Nicholls*, 112 Ill. 269; *Alexander v. Merrick*, 121 Ill. 600; *Mecartney v. Morse*, 137 Ill. 481; *Gage v. Goudy*, 141 Ill. 215; *Brophy v. Taylor*, 30 Ill. App. 261.

Nor do we view the decision in *Gage v. Bailey*, 115 Ill. 646, relied upon by counsel for appellee, as in any way a departure from the rule announced in the decisions above cited. In that case there was a deposit by complainant of the amount which the bill alleged was due for redemption, and the court merely held that in the absence of any answer averring that such deposit was insufficient, it was to be taken as confessed that it was sufficient.

The decree should also have imposed the payment of the costs of the suit upon the complainant, for there is no allegation in the bill of complaint that any tender had ever been made to appellant Glos before the suit was brought. *Gage v. Arndt*, 121 Ill. 491; *Mecartney v. Morse*, 137 Ill. 481; *Cotes v. Rohrbeck*, 139 Ill. 532; *Glos v. Goodrich*, 175 Ill. 20.

The decree is reversed and the cause is remanded.

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Belt Ry. Co. v. Frank T. Kinnare, Adm.

1. **VERDICTS—When Court May Set Aside.**—When the verdict is manifestly against the weight of evidence, it is not only within the power, but it is the duty of the court, to set it aside.

Action in Case, for personal injuries. Trial in the Circuit Court of Cook County; the Hon. GEORGE W. BROWN, Judge, presiding. Verdict and judgment for plaintiff; appeal by defendant. Heard in the Branch Appellate Court at the October term, 1898. Keversed. Opinion filed May 26, 1899.

EDGAR A. BANCROFT, attorney for appellant.

JAMES C. McSHANE, attorney for appellee.

MR. JUSTICE HORTON delivered the opinion of the court.

December 6, 1895, Joseph M. Murphy was instantly killed at Pullman Junction, in this county, by being run over by the tender attached to a locomotive engine belonging to appellant. There is practically no conflict in the testimony. This suit is brought by the administrator of the estate of said Murphy. In the trial court there was a verdict followed by a judgment in favor of appellee (plaintiff below). From that judgment the railroad company prosecutes this appeal. There is no complaint made as to the pleadings or the amount of the judgment.

At the time of his death deceased was in the employ of appellant. He had been in such employ about sixteen months. The first ten or twelve months he was a helper to another conductor. The remainder of the time, and at the time of his death, he was himself a conductor in charge of a switching and transfer crew. Early in the morning, December 6, 1895, he and his crew took their engine, No. 44, went to the South Chicago yard of appellant and got a train of loaded cars. They put their engine at the head and their caboose at the rear of this train and started west over the line of appellant. They reached Pullman Junction about 7:30 A. M., and stopped for orders.

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At that place appellant has two main tracks, one called the north-bound track and the other the south-bound track, although at that point these tracks run nearly east and west. The telegraph office is south of the south-bound track. The train of which deceased was in charge, was on the north-bound track and his engine, No. 44, stopped nearly opposite the telegraph office. He went to that office, and upon there receiving his orders, crossed the south-bound track and went to his engine. When he crossed that track engine No. 33 had started from a switch which was about 300 feet west of deceased and was backing slowly east on the south-bound track.

The tracks of appellant are crossed by the track of the N. Y. C. & St. L. R. R. (the Nickel Plate) a short distance east of said telegraph office. Two of appellant's engines, Nos. 4 and 12, were standing on said south-bound track just east of the Nickel Plate crossing. No. 12 was furthest west, that is, nearest to No. 33.

As the engine of deceased's train started west, and as he left it, he turned and looked at No. 33 as it was going east. The distance it was from him at that moment is not stated.

The main tracks at that place were straight; it was a bright, clear morning, and there was nothing between deceased and No. 33 to obstruct the view. Deceased started and walked east between the north-bound and the south-bound tracks toward the caboose of his train. The engineer of engine No. 33 watched the deceased, who continued walking between the tracks, until that engine was within forty or fifty feet of him. That engine was nearing the Nickel Plate crossing, before reaching which it must stop, and the engineer therefore turned around to take hold of his brake handle to stop his engine. The deceased did not continue walking east between the east and the west-bound tracks, but the next seen of him he was standing between the rails of the east-bound track in front of the tender of the approaching engine No. 33. He was an intelligent and experienced railroad man, and must have known that the engineer of No. 33 could not see him as he stood between

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the rails, because the tender of that engine intervened. He was thus standing with his back toward, and less than fifty feet from, the approaching engine, holding some paper in his hands which he was apparently reading. The engineer of No. 12 saw the danger and, with the whistle of his engine gave the signal to stop. But it was too late. The deceased was struck and run over by the tender and instantly killed. Engine No. 33 was moving very slowly at the time. It was nearing the Nickel Plate crossing, where it must stop.

The foregoing are undisputed facts. Whether the bell of No. 33 was ringing at the time the tender of that engine struck deceased, is uncertain. The engineer of 33 says the bell was ringing all the time. A switchman who was on No. 33, says that he pulled the bell cord twice, and that the bell had stopped ringing at the time of the accident.

Whether the bell was or was not ringing, we do not regard as a controlling question. The view most adverse to appellant may be assumed as to that. The important question is: Was the deceased in the exercise of ordinary care, or was he guilty of contributory negligence? To that question we have given careful consideration. If there was as to this question any serious conflict in the testimony, the verdict of the jury might be controlling. Where there is no conflict in the testimony, the court may consider the question as to whether the evidence is sufficient to sustain the verdict. In other words, when the verdict is manifestly against the weight of evidence, it is not only within the power, but it is the duty of the court to set the verdict aside.

We are of opinion that the verdict in this case can not be sustained. We have, therefore, stated the testimony very fully. It shows that without any apparent necessity for so doing, the deceased stepped between the rails of a railway track in front, and within a few feet of an approaching engine, and stood there with his back toward the engine. No reason whatever is shown for his so doing. He might have continued to walk between the west and the east bound-

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tracks, and have thus reached his caboose in perfect safety. No one had called to him or in any manner attracted his attention. From the record and testimony in this case, we can not avoid the conclusion that deceased was not in the exercise of due care and caution, but was guilty of contributory negligence. More than that: but for the negligence of deceased—negligence which was wholly inexcusable so far as the testimony shows—the accident could not have happened.

It does not appear that any different or stronger case for appellee could be made upon a retrial. It would seem that all persons who saw the accident were called as witnesses, except the switchman who called the attention of the engineer of No. 12 to the dangerous position of deceased. There is no criticism as to the testimony of any witness, or as to any apparent interest or prejudice of any witness. We can not see any good reason why this case should not be reversed without remanding.

The judgment of the Circuit Court is reversed.

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Peter Lapp and Lem. W. Flershem v. William H. Smith
and Alfred R. Crosby.

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1. **PAYMENT—Conditional Tender of Checks, etc.**—Where a debtor sends a check to his creditor for a part of his indebtedness and notes for the balance, without stating that they were sent and were to be accepted in full payment and satisfaction of his indebtedness, the creditor has the legal right to apply the check in part payment of the indebtedness, and upon tendering back the notes, to sue for the balance.

Assumpsit, for merchandise sold and delivered. Trial in the Superior Court of Cook County; the Hon. JOSEPH E. GARY, Judge, presiding. Verdict and judgment for plaintiffs; appeal by defendants. Heard in the Branch Appellate Court at the October term, 1898. Affirmed. Opinion filed June 12, 1899.

FLOWER, SMITH & MUSGRAVE, attorneys for appellants.
When an account is disputed and the debtor makes an

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offer as settlement in full, the acceptance and use of the proceeds of that offer constitute an accord and satisfaction, although the creditor at the time declares that he will not accept it in full of the account. Ostrander v. Scott, 161 Ill. 339; Fuller v. Kemp, 138 N. Y. 238; McDaniels v. Bank, 29 Vt. 230; Donohue v. Woodbury, 60 Mass. 148; Calkins v. State, 13 Wis. 389.

Acceptance of a part of the proceeds of an offer or of a contract is held to be an acceptance of the whole when the opposite party so elects. Harzefeld v. Converse, 105 Ill. 534; Wolf v. Dietzsche, 75 Ill. 205; First National Bank v. Crocker, 111 Mass. 163; Nutting v. Sloan, 57 Ga. 392; Emery v. Irving National Bank, 25 Ohio St. 360.

STRICKLER & KNIGHT, attorneys for appellees.

There was no acceptance of the offer of settlement. An acceptance of an offer must be unconditional and entire. If an acceptance with a condition not contained in the offer is made it becomes a counter offer and is no acceptance. McClay v. Harvey, 90 Ill. 525; Rugg v. Davis, 15 Ill. App. 647; Kirk v. Wolf Mfg. Co., 118 Ill. 567; Fox v. Turner, 1 Ill. App. 153; Smith v. Wetherell, 4 Ill. App. 655; Ada St. M. E. Church v. Garnsey, 66 Ill. 132; Corcoran v. White, 117 Ill. 118.

The mere giving of a promissory note does not of itself extinguish a precedent debt whether it be an account or other demand. Archibald v. Argall, 53 Ill. 307.

And the *onus* of showing that it is an extinguishment lies upon those who allege it. Hayward v. Burke, 151 Ill. 121.

MR. JUSTICE ADAMS delivered the opinion of the court.

Appellants, by their own admission, were indebted to appellees in the sum of \$2,245.41 for goods, wares and merchandise sold and delivered, which amount was due to appellees, but appellants contended that appellees were indebted to them in the sum of \$50 for advertising appellee's goods in appellants' catalogues, and this amount of \$50 was in dispute between the parties. May 7, 1898, appellants wrote to appellees, inclosing to them a check for \$500 and three

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notes, each dated May 16, 1898, and payable to the order of appellees, one for \$563.13 due in four months from date, one for \$565.14, due in five months from date, and one for \$565.14 due in six months from date.

The letter inclosing the check and notes was as follows:

“Enclosed please find check and notes for your statement also sent herewith, less legitimate deductions. We have done business with you pleasantly a great many years, and hope that the present misunderstanding will not terminate our dealings with you in the future on a basis which may be mutually agreeable, to be suggested by you. For reference we send you a memorandum of the last three settlements of your account, which so far as we know were perfectly satisfactory to you. After a calm scrutiny and verification with your books, you will certainly agree that the present settlement is as good, if not better, than those of the past.”

To this letter appellees, under date of May 12th, responded as follows:

“Your proposed settlement is not satisfactory to us; much of the account has run over two years. We have, therefore, referred the whole matter to the Board of Trade for adjustment. We will say in addition that we shall allow no deductions for catalogue or any other charges, but insist upon an immediate and full statement.”

Appellees retained and drew the money on the check, and tendered back the notes to appellants, which tender appellants refused, except accompanied with the check, and demanded the check, which demand appellees declined to accede to. On the trial appellees produced the notes and again tendered them to appellants.

The jury were instructed by the court to find for appellees and to assess the damages at the sum of \$1,695.41. A verdict was returned and judgment rendered accordingly.

The amount of the judgment is the amount appearing to be due by appellees' statement of account, less the \$500 check and less also the \$50 in dispute, which last amount appellees allowed on the trial.

The contention of appellants is, that the check and notes were offered to appellees in full settlement of the account between the parties; that appellees were bound to accept the

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offer or reject it *in toto*; that if they rejected it, it was incumbent on them to return both the check and the notes, and that having retained the check and appropriated the money for which it was drawn, they must be held to have accepted appellants' offer, and therefore can not recover in the present suit, but only on the notes which were not due when the suit was commenced. Appellants' counsel cite in support of this contention, *Ostrander v. Scott*, 161 Ill. 339; *Fuller v. Kemp*, 138 N. Y. 238; *McDaniels v. Bank*, 29 Vt. 230; *Donohue v. Woodbury*, 60 Mass. 148; *Calkins v. State*, 13 Wis. 389.

In *Ostrander v. Scott*, the check sent by the debtor was expressed to be "in full account to date." In *Fuller v. Kemp* the check was enclosed to the creditor by the debtor in a letter in which he stated the check to be in full satisfaction of the plaintiff's claim for professional services against him to date.

In *McDaniels v. Bank*, *supra*, and in *McDaniels v. Lapham et al.*, 20 Vt. 222, referred to in the former case, it appeared that there was an unliquidated account between the parties, and that the special agent of the debtor, in accordance with written instructions from his principal, tendered to the creditor, on behalf of his principal, the sum of \$1,875, to be received by the creditor in full satisfaction of the amount due him, the agent informing the creditor that he had no instructions to pay or tender the money, except on condition that it would be received in full payment and satisfaction of the claim. The creditor refused several times to accept the money on that condition, but finally received it and tendered the agent a receipt, which the latter refused to receive. The court held that the receipt of the money by the creditor operated as satisfaction in full of the claim. In *Donohue v. Woodbury*, 60 Mass. (6 CUSH.) 148, *supra*, there was a disputed account between the parties, and the attorney for the defendant tendered to the plaintiff's attorney \$35 in gold "for all that Woodbury was owing Donohue," and the money was accepted without words. *Held*: "If an offer of money is

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made to one, upon certain terms and conditions, and the party to whom it is offered takes the money, though without words of assent, the acceptance is an assent *de facto*, and he is bound by it.” In the Wisconsin case cited *supra* the claim was against the State for printing. The legislature appropriated an amount expressed as “being payment in full for printing,” etc. The claimant accepted the appropriation, and it was held that his acceptance of the amount appropriated was an acceptance of the terms of the appropriation. The cases in 21 and 29 Vt., and the case in 136 N. Y., cited *supra*, all proceed on the ground that the tender was made on the condition that it was to operate as payment in full, and the decision in *Ostrander v. Scott* is based on the same ground, the court saying: “The check was made, on its face, a payment in full of all demands to date, and the effect, when it was received, indorsed and collected, was the same as if it had been tendered accompanied with a receipt in full of all demands to date, and the plaintiff had received the check and signed the receipt. It was enclosed in a letter stating that it was in full of account,” etc.

In the present case there was no condition annexed to the offer of the check and notes, no statement that they were sent in full of the account, or that they were to be so received. The language is, “Enclosed please find check and notes for your statement, also sent herewith, less legitimate deductions.” We do not think the cases cited by appellants’ counsel are applicable, and are of opinion that the court was warranted in holding that appellees were not bound to return the check; that they had the legal right to apply it in part payment of appellants’ indebtedness to them, and, upon tendering back the notes, to sue for the balance of the account.

We are not disposed to go to greater length than did the court in the *Ostrander* case.

The offer of appellants was in writing, and it was a question for the court whether the offer was such that appellees were bound to accept it wholly or reject it wholly.

2 Parsons on Contracts (6th Ed.), 492; Lintner v. Milliken, 47 Ill. 176, 181.

Appellants' counsel asked several instructions on their theory of the case which we think were properly refused.

The judgment will be affirmed.

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Mary Lundon v. City of Chicago.

1. CITIES AND VILLAGES—*Right to Claim Exemption from Liability—Defects in Sidewalks—Notice.*—A city has no right to claim exemption upon the ground that some particular officer has not been notified of the dangerous condition of a sidewalk. It is the duty of the city's representatives, as, for example, its police or other employes, to notify the proper officer whose duty it is to repair defective sidewalks and keep them in order, and meanwhile to take proper precautions to warn people of the danger, and prevent accidents, and notice to such officers is notice to the city.

2. INSTRUCTIONS—*Conclusions Must be from the Evidence.*—Juries must form their conclusions as to facts from the evidence alone. An instruction that "if they believe from the evidence and instructions of the court that the plaintiff has failed to prove any of the material allegations of her case," etc., then the verdict should be not guilty, is erroneous.

3. SAME—*Preponderance or Great Weight of the Evidence.*—An instruction that "the plaintiff must prove her case by a preponderance or great weight of testimony," is misleading.

Action in Case, for personal injuries. Trial in the Superior Court of Cook County; the Hon. JOHN BARTON PAYNE, Judge, presiding. Verdict and judgment for defendant; appeal by plaintiff. Heard in the Branch Appellate Court at the October term, 1898. Reversed and remanded. Opinion filed June 9, 1899.

C. S. O'MEARA, attorney for appellant.

MR. PRESIDING JUSTICE FREEMAN delivered the opinion of the court.

This is an action for damages alleged to have been caused by falling through an opening in a sidewalk covered by a

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loose plank. The jury found the defendant not guilty, and the plaintiff appeals.

As the case must be submitted to another jury, we refrain from discussion of the evidence.

The court instructed the jury that, in order to find the defendant guilty of negligence, the jury must believe from a preponderance of the evidence that the city had direct notice of the dangerous conditions "given to its officer having charge or oversight of the place in question," or that the unsafe condition had lasted long enough so that, in the exercise of reasonable care, the city ought to have known. The record does not show that the city has any such officer, nor indicate where he could be found. The city has no right to claim exemption upon the ground that some particular officer has not been notified of the dangerous condition of a sidewalk. It is the duty of the city's representatives—as, for example, its police or other employes—to notify the proper officer, whose duty it is to repair such places and keep them in order, and meanwhile to take proper precautions to warn people of the danger and prevent accident; and notice to such officers is notice to the city.

Another instruction told the jury that, if they "believe from the evidence and instructions of the court that the plaintiff has failed to prove any of the material allegations of her case," etc., then the verdict should be not guilty.

Juries must form their conclusion as to facts from the evidence alone. Instructions of this nature have been heretofore condemned. L. S. & M. S. Ry. Co. v. Rohlfs, 51 Ill. App. 215-220; Kranz v. Thieben, 15 Ill. App. 482-484. In the case before us, certain instructions of the court are clearly erroneous, and if the jury render their verdict because they believe such instructions, they are misled.

The jury were also instructed that "the plaintiff must prove her case by a preponderance or great weight of testimony," which is clearly misleading.

Exception is taken to remarks of the court during the trial. We think some criticism is justified by this record,

and that appellant may have been prejudiced. She may or may not be entitled to recover, but is entitled to another trial. The judgment of the Circuit Court is reversed and the cause remanded.

Western Electric Co. v. W. F. Parish.

1. JUDGMENTS—*Power of Appellate Court to Reverse*.—The Appellate Court has the power to reverse a judgment based upon the verdict of a jury where the verdict is manifestly against the weight of the evidence, but it is a power which must be sparingly exercised.

2. VERDICTS—*Not to be Disturbed, When*.—A verdict, sanctioned by the trial judge, who heard and saw the witnesses, and had many other opportunities of testing the weight their testimony was properly entitled to, should not be disturbed except upon satisfactory evidence that injustice has been done.

3. PRACTICE—*Abstract Must Contain Matter Urged as Error*.—Parties who wish to reverse judgments must present in their abstracts what it is they rely upon as constituting error.

4. HARMLESS ERROR.—In an instruction given for the defendant, the use of the words "scrap iron," as indicating the condition of an engine, is erroneous; but as the jury were told that they should give credit for the actual value of the engine, and as the only evidence in the case as to its value was to the effect that it was worth fifty dollars, the error is harmless.

Assumpsit, upon the common counts and a written guaranty. Trial in the Superior Court of Cook County; the Hon. SAMUEL C. STOUGH, Judge, presiding. Verdict and judgment for defendant; appeal by plaintiff. Heard in the Branch Appellate Court at the October term, 1898. Affirmed. Opinion filed June 9, 1899.

FLOWER, SMITH & MUSGRAVE, attorneys for appellant.

GILBERT & GILBERT, attorneys for appellee.

MR. JUSTICE SHEPARD delivered the opinion of the court.

The declaration in assumpsit, by the appellant as plaintiff, against the appellee as defendant, consisted, beside the common counts, of special counts upon a written guaranty by the appellee to the appellant of the payment of all bal-

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ances up to a stated amount, which might become due to appellant from the W. F. Parish Machinery Company in the course of dealing between appellant and said machinery company.

The claim of appellant was for the balance of \$247.50, claimed to be due from the machinery company upon an account rendered. The defense was that appellant had failed and refused to give credit for \$260, the price of an engine which the machinery company had furnished for the Kimbark building under a contract therefor with appellant.

The refusal by appellant to allow such credit was sought to be justified upon the ground that the engine in question, though furnished, did not fulfill the guaranty given by the machinery company as to its manner of working, etc., and that it was, after a three months' trial, taken out of the building by the machinery company and appropriated to its own use, and thereby the appellant was precluded from getting its pay from the owners of the building for which the engine was furnished.

The reply of appellee was that the engine did its work well enough, and that though it was taken out by the machinery company, it was so done because it had been broken and rendered practically useless through the carelessness of those who had it in charge, and a new one was required in its place.

There were some other questions of fact of minor importance which we do not need to speak particularly of, as we regard those we have mentioned as being of controlling effect.

We agree with counsel for appellant, that this court has the power to reverse a judgment based upon the verdict of a jury where the verdict is manifestly against the weight of the evidence, but it is a power which must be sparingly exercised. A verdict, sanctioned by the trial judge, who heard and saw the witnesses and had many other opportunities of testing the weight their testimony was properly entitled to, which a reviewing court does not possess, should not be disturbed except upon satisfactory evidence that injustice

has been done. The abstract of the testimony of one of the witnesses refers to certain accounts rendered to the appellant by the machinery company, in which appellant is charged with the contract price for the engine, and a credit thereon is proved nearly balancing the account, from which the jury, in connection with other evidence, may have been justified in finding that the appellant had accepted the engine.

The probabilities are that somebody has suffered the loss of the value of the engine in question; it was proved to be worth not over fifty dollars at the time it was removed. If we could say from the evidence before us that the judgment had worked a clear injustice in putting such loss upon the appellant, we would reverse it; but after a careful consideration of all the evidence disclosed by the abstract, we are unable so to say.

The contention that the court erred in admitting certain printed and written papers may be disposed of, by once more calling attention to the well settled rule that parties who wish to reverse judgments must present in their abstract of record what it is they rely upon as constituting error. The abstract does not show either or any part of the documents which it is claimed were erroneously admitted in evidence.

It is urged that it was error by the trial court to refuse to instruct the jury in behalf of appellant, that if the machinery company made no objections to certain items of the account which formed the basis for a suit, then the jury should find the account to be correct as to such items, in the absence of proof of fraud or mistake.

There is no evidence that the account was ever presented to the machinery company but once, nor that payment of it was ever demanded except by the beginning of the suit. A party to whom an account is presented and payment requested, is entitled to a reasonable time afterward to examine the account before the rule attempted to be stated in the refused instruction becomes applicable.

The argued error in connection with the last clause of

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the instruction given for the appellee, wherein the words "scrap iron" are used as indicating the condition of the engine when removed, is technically well founded; but inasmuch as the jury were told that they should give credit for the actual value of the engine as it was when taken out, and as the only evidence in the case as to its then value was to the effect that it was worth fifty dollars, it is hardly possible any harm was done.

We do not discover any reversible error in the record, and the judgment of the Superior Court will be affirmed.

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**George Strong and Sarah M. Strong v. Mary E. Hart,
and F. B. Hart, Successor in Trust.**

1. MORTGAGE—When Equity Will Deny Relief.—A mortgage is a mere chose in action, and when the powers of a court of equity are called into activity to enforce it, relief will be denied if there are equitable reasons why its power should be withheld, or if in equity and good conscience, the relief asked should not be granted.

Foreclosure.—Trust deed. Trial in the Circuit Court of Cook County; the Hon. MURRAY F. TULEY, Judge, presiding. Decree for complainant; error by defendants. Heard in the Branch Appellate Court at the October term, 1898. Reversed and remanded. Opinion filed May 26, 1899.

WILLIAM F. WIEMERS and ELMER E. WAGNER, attorneys for plaintiffs in error; **FREDERICK S. BAKER,** of counsel.

H. G. COLSON, attorney for defendant in error.

Statement of the Case.—Defendant in error, Mary E. Hart, filed her bill to foreclose a trust deed given by the plaintiffs in error to secure a note for \$1,200, executed and delivered by them to one John W. Hart in his lifetime. The complainant, Mary E. Hart, sues as the legal holder and owner of said note.

The defense, as set up by answer and cross-bill, is that the note was originally without consideration, and obtained

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by duress; that Mary E. Hart is not the legal holder or owner of the note, but that her possession is fraudulent as against plaintiffs in error.

Briefly stated, the circumstances under which the \$1,200 note in controversy was given, are substantially as follows: Plaintiffs in error made an exchange with defendant in error, Mary E. Hart, of an eighty-acre farm for certain real estate, the title to which stood in Mary E. Hart. One condition of the exchange was that plaintiffs in error should pay and obtain the release, within seven weeks, of an incumbrance of \$650 upon the farm conveyed by them. This they found themselves unable to do within the time agreed upon, and so informed John W. Hart, requesting further time in which to pay and secure a release of the incumbrance in question. This, it is alleged, Hart refused, and threatened immediate foreclosure of a trust deed given by plaintiffs in error to secure the performance of the agreement to pay said incumbrance of \$650. Plaintiff in error, satisfied that such a foreclosure would result in the loss of all his property, then proposed a rescission of the trade and a re-exchange of the respective properties, so as to place all parties in *statu quo*. This Hart refused to consent to unless plaintiffs in error should execute and deliver to him, Hart, for his own use and benefit, the note for \$1,200 and the trust deed now in controversy.

Plaintiffs in error allege that, although conscious of the injustice of this proposition, they were compelled to yield to it, the alternative being the loss of all their property and financial ruin. They executed, therefore, and delivered to John W. Hart the note and trust deed now in controversy, and the respective properties were re-conveyed as they stood originally.

This was in January. In June or July following, John W. Hart became seriously ill, and, convinced that he could not recover, sent for Strong, and, it is alleged, said that he did not expect to recover; that he knew he had taken an unfair and unjust advantage in obtaining the \$1,200 note and trust deed; that he was anxious to rectify the matter

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while he still lived and free his conscience. He then told Strong, it is claimed, that if he, Strong, would pay the interest coupon for \$36, which would be due July 9th, that sum would fully satisfy him for all the trouble and expense to which he had been subjected, and that he would thereupon release and discharge all claim to the \$1,200 note and the trust deed securing the same. A few days subsequently Strong again called on Hart, paid him the \$36, and received receipt as follows:

“CHICAGO, July 9, 1896.

Received of George Strong thirty-six dollars, it being the interest due on mortgage of \$1,200, payable to J. W. Hart.
J. W. HART.

\$36.00.”

“CHICAGO, July 9, 1896.

Received of George Strong, twelve hundred (\$1200) dollars in full for a note given Jan. 9, 1896, secured by a mortgage on a farm in Section 12, Town of Wheeling, Cook Co.

JOHN W. HART.

\$1,200.”

It is alleged that Hart stated to Strong that the note, coupons and trust deed were in a safety deposit vault; and the receipts were given for that reason, and in full discharge of any claim, Hart stating that he would obtain the papers from the vault and return them to Strong as soon as he could do so. Hart died soon after, and before the papers were returned to Strong.

Exceptions were filed to the parts of the answer alleging these facts, and were sustained, the Circuit Court expunging all of these matters as impertinent and irrelevant. A demur-rer was sustained also to the cross-bill in like manner. Plaintiffs in error elected to stand on their answer and cross-bill. A decree was accordingly entered against them.

MR. PRESIDING JUSTICE FREEMAN delivered the opinion of the court.

It is contended that the note secured by the trust deed sought to be foreclosed was without consideration.

In the view we take of the transaction we do not deem it necessary to discuss the questions raised in the briefs as

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to the effect of these receipts in connection with what was said and done in releasing or discharging the obligation of the note.

The original exchanges of property were not between the plaintiffs in error and John W. Hart, but Mary E. Hart, his wife. The property conveyed to Strong was conveyed by Mary E. Hart and the property conveyed by Strong was conveyed to her. When the reconveyances were made the parties were put in *statu quo*, each receiving back what they had respectively originally owned. But John W. Hart demanded the execution of this \$1,200 note secured by the trust deed for his own use and benefit, as a condition of permitting his wife to reconvey and accept the reconveyance from the Strongs, or of consenting thereto. It appears, therefore, that the note in question was not given to Mary E. Hart as a consideration for rescinding the bargain, but as a donation to John W. Hart, extorted not as a consideration for value received by Strong from Mary E. Hart in making the reconveyance, but as the only alternative to prevent the entire loss of the property. No actual consideration appears to have passed from John W. Hart to the Strongs. The defendant in error, Mary E. Hart, claims to now own the note in question as assignee of her deceased husband. She does not claim that the note was given to him as her agent in consideration of the reconveyances made. Her title comes only through him and the only consideration given by him was his consent, or his withdrawal of opposition, to the re-exchange. He conveyed an inchoate right of dower in one piece of property, but acquired the same right in other property in return. This was not such consideration as the law regards sufficient, under circumstances such as then existed between the parties, for a note of this amount. It is to the credit of Mr. Hart that he himself recognized the lack of consideration, the injustice of attempting to collect the note, and sought to right the wrong while it was still in his power to do so. Of this, the receipt signed by him in person furnishes, in connection with the circumstances,

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satisfactory evidence. That receipt, we think, was intended by Hart to evidence the fact and is an admission by him that the \$1,200 note was not justly due him and was without consideration. Nor does the fact that Mary E. Hart now claims to hold the note and trust deed for a good consideration, and as assignee of her deceased husband, give her any additional right, as the facts now appear. The note to her husband was given at the time and in connection with the transaction between herself and the Strongs. It became incumbent upon her to show what right, if any, she has. She is seeking now to foreclose the trust deed.

“The uniform holding in this State is, that a mortgage is a mere chose in action, and when the powers of a court of equity are called into activity to enforce it, relief will be denied if there are equitable reasons why its power should be withheld, or if in equity and good conscience the relief asked should not be granted.” Scott v. Magloughlin, 133 Ill. 33.

The judgment of the Circuit Court is reversed and the cause remanded.

**William E. Hatterman v. Tonnes M. Thompson, for
Use, etc.**

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1. **WAIVER—Of Defects in Taking an Appeal by Certiorari.**—Taking an appeal from a justice by certiorari is provided for by statute, and where the appellee, instead of moving to quash, waits until the cause is reached for trial and then asks and obtains a continuance, he waives all irregularities in the method of taking the appeal.

2. **INSTRUCTIONS—Must be Based upon the Evidence.**—An instruction which tells a jury that they may allow interest for unreasonable and vexatious delay after a certain date, where there is no evidence upon which to base it, is erroneous.

3. **INTEREST—What is Not an Unreasonable and Vexatious Delay of Payment.**—To appear and defend a suit is a right which can not be construed into unreasonable and vexatious delay of payment without impairing the right itself.

Appeal from the Circuit Court of Cook County; the Hon. CHARLES G. NEELY, Judge, presiding. Heard in this court at the October term, 1898. Reversed and remanded. Opinion filed June 12, 1899.

Statement of the Case.—The appellee, Thompson, confessed a judgment for \$143.79 in favor of the Chicago Sash & Door Co., before a justice of the peace, December 11, 1895, on which immediate execution was issued and returned *nulla bona*. On the same day a garnishment suit was brought, in the name of Thompson for the use of the judgment creditor, against appellant, and a final judgment was rendered against him December 24, 1895, from which he appealed by certiorari to the Circuit Court, January 18, 1896.

May 26, 1898, the appearance of appellee was entered, and he thereafter, on June 23, 1898, when the case was called for trial and before the jury was impaneled, made a motion to quash the writ of certiorari, which was overruled. It also appears that about a week prior to the making of the motion to quash, the case was reached for trial, when the plaintiff (appellee here) moved to continue the cause, to which motion appellant's counsel agreed, and pursuant to such agreement the case was set down for hearing on June 23, 1898. It appears from the evidence that Thompson bought of appellant lots 8 and 9, described below, October 14, 1894, agreeing to pay for each lot \$300, and appellant agreed to loan him \$1,200 to build a house on each lot, \$600 for each house. They made the following agreement in writing, which is signed by appellant alone, viz.:

“CHICAGO, October 20, 1894.

Agreement made between Tonnes M. Thompson and William E. Hatterman. Whereas, said Tonnes M. Thompson has purchased from William E. Hatterman lots 8 and 9, block 4, in Hatterman's Irving Park Boulevard Subdivision, for the sum of \$300 each, and gave William E. Hatterman a note secured by trust deed on each lot for \$900 each. First, the said William E. Hatterman agrees to pay to the said Thompson the sum of \$600 for each house, which amount the said Thompson is to use in erecting a frame cottage on each lot to be not less than 20x40 feet.

WILLIAM E. HATTERMAN.”

There is no evidence in the record as to any other or further specifications as to the character of the house to be built. Thompson and his wife also, as part of the trans-

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action, made and delivered to appellant their trust deed, dated October 14, 1894, by which they conveyed to appellant said lot 8, to secure their note of even date, made by them, payable to their own order and by them indorsed, for the sum of \$900, due five years after date, bearing interest at seven per cent per annum, payable semi-annually, and ten interest notes, each for \$31.50, made by Thompson alone, payable to his order and by him indorsed, becoming due every six months after the date of the principal note, and bearing interest at seven per cent per annum after maturity. This trust deed provides that in default of payment of the interest or any part thereof when due, the whole of the principal sum and interest should thereupon, at the option of the legal holder thereof, become immediately due and payable.

There is no controversy relating to lot 9. Thompson testified that he built a frame cottage on lot 8, twenty feet, six inches, by forty-one feet, six inches, and that he did the last work on it six months before this suit was begun, and that a man named Murson lived in it about four months; also that the house "was all completed and painted once;" also that he did work on it about a year afterward.

As to whether the house was completed or not, there was a conflict in the evidence.

The witness Smith, for appellant, testified in substance that the house required for completion four cellar sash windows, three stops necessary under sill and one under chimney; that it only had one coat of paint, and that the iron railing wasn't upon the front stoop, all of which would cost \$93.10, and also that the painting was the substance of what he had mentioned. He was corroborated by another witness, Sampson.

Appellant's attorney testified that appellant sent him the notes above mentioned December 1, 1895, and directed him "to foreclose on whole amount due on these notes; that he had declared the whole sum due." Thompson also testified that on December 3, 1895, appellant gave him the following statement, on which he said no money had been paid, viz.:

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“CHICAGO, Dec. 3, 1895.

Mr. T. M. Thompson,

In account with Wm. E. Hatterman,
 Real estate, loans, renting and insurance,
 768 Milwaukee avenue:

	Loan.....	\$900 00
	Lots 8-4.....	\$300 00
1894	Recording T. D.....	1 20
Nov. 17.	Paid lumber.....	306 28
Dec. 17.	“ N. D. Messenger & Co....	2 87
Jan. 12.	“ insurance (3 houses).....	45 00
March 3.	“ plasterer (book).....	50 00
April 5.	“ “ “	50 00
		—
	Balance on hand.....	\$755 35

On completion of house.....\$144 65

There is still unpaid the bills for hardware and millwork amounting to about \$175. Thompson must bring in the difference first and finish the house, then these bills will be paid.”

Appellant's counsel, on cross-examination of Thompson, sought by different questions propounded to show by him what he had done on the house after this statement was given him, and also that on a former trial of a similar suit he had stated that he would complete this building, to all of which objection was made and sustained by the court.

Among the instructions to the jury, the following for plaintiff were given, viz.:

“ 1. If you find from the evidence in this case that T. M. Thompson had, prior to December 15, 1895, given to W. E. Hatterman his note for the sum of \$900, secured by a trust deed on certain real estate, and that on said date there was in the hands of said Hatterman more than the sum of \$143.79, due to said Thompson, then you will find the issues for the plaintiff.”

“ 2. If you find from the evidence in this case that some time prior to December 15, 1895, T. M. Thompson, the plaintiff, had given to W. E. Hatterman his note for the sum of \$900 secured by a trust deed on certain real estate, and that on that date said Hatterman was indebted to said Thompson in an amount exceeding the sum of \$143.79, and that there has been an unreasonable and vexatious delay in

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the payment of the same, then you will find the issues for the plaintiff and assess the plaintiff's damages at the sum of original judgment in favor of the Chicago Sash & Door Company v. T. M. Thompson, with interest on the same from December 15, 1895, to this date."

A verdict for the plaintiff was rendered for \$174.31, on which the court gave judgment, from which this appeal is taken.

HERVEY H. ANDERSON, attorney for appellant.

FRED H. ATWOOD and FRANK B. PEASE, attorneys for appellee.

MR. PRESIDING JUSTICE WINDES, after making the foregoing statement, delivered the opinion of the court.

Appellee has assigned a cross-error to the effect that it was error to overrule the motion to quash the writ of certiorari.

Appellant claims that the court erred in excluding evidence, in giving plaintiff's instructions, and that the verdict is against the weight of the evidence.

By entering his appearance and asking a continuance, appellee waived his right to have the writ of certiorari quashed. This mode of taking an appeal is provided by statute. The Circuit Court had, by law, jurisdiction of the subject-matter, and the entry of appellee's appearance gave it jurisdiction of his person, after which he should, at the earliest moment, have made his motion to quash. Instead of doing that, he waited until the cause was reached for trial, when he asked a continuance for one week, which was granted him, and the case set down for hearing. By this action he waived all irregularity in the method of appeal. The motion to quash goes to the jurisdiction of the court to entertain the appeal. Pearce v. Swan, 1 Scam. 266-9; Easton v. Altum, Id. 250; Mitchell v. Jacobs, 17 Ill. 235-7; Roberts v. Thompson, 28 Ill. 79; Roberts v. Formhalls, 46 Ill. 66.

In view of the fact that there were no specifications or contract as to the character of cottage to be built by

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Thompson, except that it was to be a frame cottage, to be not less than twenty by forty feet, we are not prepared to hold it was reversible error for the court to sustain the objections to the questions on cross-examination, by which appellant's counsel, it seems, expected to elicit a statement by Thompson as to what he had done on the house after December 3, 1895, and also what the witness had stated on the trial of a similar suit he would complete the building.

The witness had stated previously that he had done work on the building about one year after December 3, 1895, but no offer was made by counsel to show the nature of the work which Thompson had done, and for all we are able to tell, from the record, it may have been work which was in no way necessary to the completion of the house. Unless we could see that the evidence was material, it was not error to exclude it. *Berkowsky v. Cahill*, 72 Ill. App. 101, and cases cited; *Nonotuck Silk Co. v. Levy*, 75 Id. 5-9.

The question as to what the witness testified to in a similar suit, being evidently for purposes of impeachment, contains no specification of time or place, and the objection thereto was therefore properly sustained.

We are of opinion that appellant's criticisms of the plaintiff's first instruction are not sound. It leaves the jury to determine from the evidence what was due from appellant to Thompson, and does not exclude from the jury any defense of appellant.

The second instruction of plaintiff was erroneous in that it tells the jury they may allow interest for unreasonable and vexatious delay after December 15, 1895. There is no evidence on which to base this part of the instruction.

This suit was begun December 11, 1895. No claim is made that there was delay of payment prior to the commencement of suit; the defense to it seems to have been made in good faith, and we know of no decision of the courts holding that a delay caused by a defense made in good faith is unreasonable or vexatious. They seem to be to the contrary. *Sammis v. Clark*, 13 Ill. 544; *Aldrich v. Dunham*, 16 Ill. 404; *Franklin County v. Layman*, 145 Ill. 145-50; *Devine v. Edwards*, 101 Ill. 132-48.

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In the Aldrich case, *supra*, the court say: "To appear and defend a suit is a right which can not be construed into unreasonable and vexatious delay of payment without impairing the right itself." For this reason, under the evidence in this case, the allowance of interest was not a question for the jury, and it should not have been submitted to them.

Appellant contends that the \$900 note and one interest note of \$31.50 were due to appellant on December 1, 1895, the one by being declared due in default of payment of interest when due, and the other by its terms, and therefore that the verdict should have been for appellant.

As to the \$900 note, it appears that on December 3, 1895, appellant made a statement of the amount due from him, \$144.65, which he gave to Thompson, in which he said nothing of a counter-claim against Thompson, and the jury were justified from this evidence in finding that the \$900 note was not claimed to be due, and moreover the evidence fails to show for what reason appellant declared this note due. Also, it was the joint note of Thompson and his wife. The note of \$31.50, which was overdue, was a proper claim of set-off against Thompson, and should have been allowed as a set-off in favor of appellant by the jury. There could be no greater recovery in this case against appellant than there could have been, had the suit been by Thompson alone. That the garnishing creditor can have no greater rights against the defendant than the nominal plaintiff could have, is the established law.

As to whether the house was completed when the judgment was confessed, there was a conflict in the evidence, and we can not say, especially as there were no specifications as to the character and manner of its completion, that the jury were not justified in finding that it was then complete. They might have found that a painting of the house two coats, or painting it at all, as well as the other matters testified to by appellant's witnesses, were not necessary to a completion.

If the appellee shall, within ten days from the filing of

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this opinion, remit the sum of \$30.52, apparently allowed for interest, and the further sum of \$37.40, being the amount due on the interest note due October 15, 1895, and interest to the date of the verdict, the judgment will be affirmed for the balance, \$106.39; otherwise the cause will be reversed and remanded.

The appellee will pay all costs in this court. Reversed and remanded.

Arthur E. Mathews v. Arthur C. McClaughry.

1. STOCKHOLDERS—*Right to Examine the Records, Papers and Books of His Corporation.*—A stockholder has the right to examine the records, papers and books of his corporation.

2. MANDAMUS—*To Enforce the Rights of Stockholders.*—Before a court will be justified in issuing a writ of mandamus to enforce the right of a stockholder to examine the records, papers and books of his corporation, there must have been some refusal or obstruction interposed to the enjoyment of such right by the party against whom the writ is sought.

Petition for Mandamus.—Trial in the Circuit Court of Cook County; the Hon. ABNER SMITH, Judge, presiding. Writ of mandamus issued; appeal by defendant. Heard in the Branch Appellate Court at the October term, 1898. Reversed and remanded. Opinion filed May 26, 1899.

ULLMANN & HACKER, attorneys for appellant.

Before applying for a mandamus the petitioner should make an express demand upon the defendant to perform the duty or act required, and there must be a refusal by the defendant to comply. *People v. Mt. Morris*, 137 Ill. 576.

E. G. LANCASTER, attorney for appellee.

There is no longer any doubt concerning appellee's right to examine the books, papers and records of his corporation and the remedy under our statute. *Stone v. Kellogg*, 165 Ill. 192; *Coquard v. Nat'l Linseed Oil Co.*, 171 Ill. 482.

MR. JUSTICE HORTON delivered the opinion of the court.

Petition for a mandamus was filed in this case June 10,

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1897. June 16, 1897, appellant filed his demurrer to said petition. July 1, 1897, W. W. Jackson, who was one of the defendants named in said petition, filed his plea to the jurisdiction. July 26, 1897, said demurrer of appellant was overruled, and thereupon and on that day, appellant elected to stand by his demurrer, which election was then entered of record. January 22, 1898, on motion of appellee, said petition was dismissed as to the defendant, Jackson, and the writs, pleadings and proceedings were by the court ordered to be amended accordingly. It was also at the same time ordered by the court that the default of appellant be entered of record; that a writ of mandamus issue against appellant; that appellee recover against appellant the costs in said cause to be taxed, and that he have execution therefor.

It appears from the allegations in said petition, that appellee is a stockholder in the corporation "W. W. Jackson & Co." The prayer of the petition is that the attorney or agent of appellee be permitted to examine the books and papers of said corporation.

Said defendant Jackson and the appellant are the only defendants named in said petition. It is stated in said petition "that Jackson and Mathews are president and secretary, respectively, and have exclusive charge, custody and control of the records, books of account, contracts, papers, etc., belonging to said corporation." Also that appellee is prevented from examining said books and papers "of which the said defendants have the sole custody and control." These are the only charges or averments in regard to appellant. There is no averment that there is any concert of action, collusion or conspiracy between said Jackson and appellant, or between appellant and any other person, or that appellant was aware of any demand upon said Jackson to see said books and papers, or that appellant ever in any way or manner hindered, delayed or prevented the examination of said books and papers by appellee or his agent or attorney. Neither is there any averment or claim of any demand or request of or upon appellant to see said

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books and papers, or any refusal on his part in that regard.

The petition abounds in charges against said Jackson personally, charges which, if sustained, would fully justify the issuing of a writ of mandamus against him. It, however, contains no charges against appellant which warrant the issuing of such a writ against appellant, or the entry of a judgment against him for costs. It is stated by counsel for appellee that said Jackson and appellant "were each, one as much as the other, in possession of the books," etc. It follows, if this be correct, that a demand upon each was necessary.

We fully agree with counsel for appellee, that there is no longer any doubt as to the right of a stockholder to examine the records, papers and books of his corporation. But it is equally well settled law that before a court will be justified in issuing a writ of mandamus to enforce such right, there must have been some refusal or obstruction interposed to the enjoyment thereof by the party against whom the writ is sought. Appellee never was entitled to such writ against appellant under the averments of his petition, and when he voluntarily dismissed said petition as to the defendant Jackson, no writ should have been issued.

In his argument filed in this court, counsel for appellee says this "is one of that kind of cases that requires an heroic remedy; and when that remedy is once administered, the results sought to be produced should not be postponed until the patient is dead." Very good; but the implied criticism can hardly attach to the court when counsel delayed for six months to ask for the writ after the trial court had decided that he was entitled to it. Neither can such criticism thus apply when counsel voluntarily removes the only medium through which the court could apply the only remedy.

Appellant is not liable for the costs to be taxed. The judgment of the Circuit Court must be reversed and remanded.

McGillen v. Wolff.

John McGillen v. Gustav R. Wolff.

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1. COUNTY COURTS—*Jurisdiction over Parties Appealing from a Justice, When Acquired.*—Although the County Court acquires jurisdiction of the persons of the plaintiff and the defendant, by the filing of the appeal bond by the one, and the entry of appearance by the other, before the term at which the appeal is dismissed, jurisdiction of the subject-matter is not acquired until the justice's transcript is filed.

2. STATUTES—*Act of 1895 Relating to Justices Does Not Repeal Sec. 68 of the Justice's Act of 1872.*—The act of 1895 contains no repealing clause, either particular or general, and so section 68 of the act of 1872 remains in full force, and is to be read and considered in connection with Sec. 1, Art. X. of the act of 1895.

3. SAME—*Repeal by Implication, When Possible.*—There must be a positive repugnancy between the provisions of a new law and an old one, to work a repeal by implication; and even then the old law is repealed only to the extent of such repugnancy.

4. SAME—*Repeal by Implication Not Favored by the Courts.*—Repeals by implication are not favored by the courts, and no statute will be construed as repealing a prior one, unless so clearly repugnant thereto as to admit of no other reasonable construction.

5. APPEALS—*Office of the Justice's Transcript.*—The justice's transcript performs the office of a declaration in original suits in courts of record, and the requirement that it shall be filed ten days before the first day of the term of court at which the case stands for trial, is in analogy with the practice in courts of record, requiring declarations to be filed ten days before the first day of the term at which judgment may be applied for.

Writ of Error to the County Court of Cook County; the Hon. HENRY W. JOHNSON, Judge, presiding. Appeal dismissed for want of prosecution; error by defendant. Heard in the Branch Appellate Court at the October term, 1898. Reversed and remanded. Opinion filed May 26, 1899.

WILLIAM J. DONLIN, attorney for plaintiff in error.

Where the transcript of the judgment is not filed ten days before a term of court, the cause does not stand for trial at that term, and except with the consent of both parties, can not be tried. That this is the interpretation given to the statute by the decisions of both the Supreme Court and of this court, is apparent from the following cases: *Hayward v. Ramsey*, 74 Ill. 372; *Sheridan v. Beards-*

ley, 89 Ill. 477; Camp v. Hogan, 73 Ill. 228; Reed v. Driscoll, 84 Ill. 96; McMullen v. Graham, 6 Ill. App. 239; Schmidt v. Skelly, 10 Ill. App. 564; Faas v. O'Connor, 6 Ill. App. 593; Marsh v. Dingman, 16 Ill. App. 406.

ARTHUR R. WOLFE, attorney for defendant in error.

MR. JUSTICE SHEPARD delivered the opinion of the court.

The only question of any importance suggested by this writ of error is, has the County Court jurisdiction to dismiss for want of prosecution, upon motion of the plaintiff, in the absence of the defendant, an appeal by the defendant from a justice of the peace judgment, at the same term in which the justice's transcript is filed. The transcript was not filed until the second day of the term at which, on the tenth day thereof, the appeal was dismissed.

Although the County Court had acquired jurisdiction of the persons of the plaintiff and the defendant, by the filing in that court of the appeal bond by the one, and the entry of appearance by the other, long before the term at which the appeal was dismissed, jurisdiction of the subject-matter was not acquired until the justice's transcript was filed. Reed v. Driscoll, 84 Ill. 96.

Indeed, it seems to be conceded by defendant in error, that unless section 68 of the justice's act of 1872 was repealed by the act of 1895 relating to justices, the appeal was, under many decisions, improperly dismissed. Reed v. Driscoll, *supra*; Hayward v. Ramsey, 74 Ill. 372; Jarrett v. Phillips, 90 Ill. 237; Sheridan v. Beardsley, 89 Ill. 477; Camp v. Hogan, 73 Ill. 228; Marsh v. Dingman, 16 Ill. App. 406.

There is nothing in the act of 1895, which, in terms, repeals section 68 (or for that matter, any other part of the act of 1872), and hence, if repealed, it must be so by implication. A statute is not repealed merely by the enactment of another statute on the same subject. There must be a positive repugnancy between the provisions of the new law and the old to work a repeal by implication; and even then the old law is repealed only to the extent of such repugnancy.

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"Nothing is better settled than that repeals * * * by implication are not favored by the courts, and that no statute will be construed as repealing a prior one, unless so clearly repugnant thereto as to admit of no other reasonable construction." Cope v. Cope, 137 U. S. 682.

"Repeal by implication is not favored, and will not be held, if both acts, by reasonable construction, may be continued in force." County of Cook v. Gilbert, 146 Ill. 268.

The rules and authorities in support might be multiplied, but those stated are enough.

Section 68 of the act of 1872, provides:

"In case the appeal from the justice of the peace is perfected by filing the papers and transcript of judgment ten days before the commencement of the term to which the appeal is taken, the appearance of the appellee may be entered in writing and filed among the papers in the case; and if so entered ten days before the first day of the term of court, the case shall stand for trial at that term."

The act of 1895 is entitled "An act to revise the law in relation to justices of the peace and constables." (P. 133, Bradwell's Laws, 1895.) Article X of that act contains all its provisions concerning appeals and certiorari, and is divided into three sections, the first one of which relates to appeals only.

So far as is pertinent to the question before us, the method of taking and perfecting appeals and the issuing of a supersedeas, is not essentially different in one act from what it is in the other, but there is no provision in the act of 1895 concerning the time when the transcript or appearance of the appellee shall be filed in order for the case to stand for trial.

All that the act of 1895 contains with reference to the transcript, is found in the last sentence of Sec. 1, Art. X, aforesaid, as follows:

"When the bond is filed before the justice, or the supersedeas is served upon him as aforesaid, the justice shall return all the papers in the case and a transcript of his docket in the case to the clerk of the court to which the appeal is taken, with a certificate under his hand that said transcript and papers contain a full and perfect statement of all the proceedings before him."

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Now add to and read with what has just been quoted, section 68 before quoted, and it is perfectly plain that there is no repugnance between the two. On the other hand the two together are perfectly consistent, and establish a complete and harmonious rule of practice.

The justice's transcript performs the office of the declaration in original suits in courts of record (*Reed v. Driscoll, supra*), and the requirement that it shall be filed ten days before the first day of the term of court at which the case shall stand for trial, is in strict analogy with the practice in courts of record, which requires declarations to be filed ten days before the first day of the term at which judgment may be applied for.

The act of 1895 containing no repealing clause, either particular or general, we have no hesitation in holding that section 68 of the act of 1872 remains in full force and is to be read and considered in connection with Sec. 1, Art. X, of the act of 1895.

It follows, therefore, that the foregoing cases cited by us are as applicable now as ever, and that the appeal was improperly dismissed, and the judgment appealed from wrongfully rendered.

The judgment is accordingly reversed, and the cause remanded.

Reversed and remanded.

Chicago Stamping Co. v. The Mechanical Rubber Co.

1. PRACTICE—*Failure to File a Plea and Affidavit of Merits.*—Where the plaintiff files an affidavit of its claim in accordance with section 36 of the practice act, it is incumbent on the defendant if he has a defense to the action, to file a plea and an affidavit of merits, and failing to do so, he is in default.

2. SAME—*Continuance for Want of Copy of Account Sued on.*—Where the plaintiff files with his declaration ten days before the commencement of the term, a copy of the account sued on containing the item, "To goods, wares and merchandise sold and delivered, \$1,000," if the defendant desires a more specific statement of account, he should

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move for such a statement. In such a case a motion for a continuance on the ground that no copy of the account sued on was filed is properly overruled.

3. SAME—*Pleading After a Motion for Default.*—After a motion for a default for want of a plea is made, the defendant can not legally plead without leave of court.

Assumpsit, for goods sold and delivered. Trial in the Circuit Court of Cook County; the Hon. ELBRIDGE HANECY, Judge, presiding. Finding and judgment for plaintiff; appeal by defendant. Heard in this court at the October term, 1898. Affirmed. Opinion filed June 12, 1899.

WILLIAM J. CANDLISH, attorney for appellant.

PAM, DONNELLY & GLENNON, attorneys for appellee.

The plaintiff filed with his declaration "a copy of the account on which the action was brought" ten days before the first day of the term. 3 Starr & Curtis' Statutes, 2994, par. 18; Bank of Chicago v. Hull, 74 Ill. 106.

The motion of appellant to continue the cause was based upon the ground that "no" copy of the account was filed. The copy of account filed was an attempt in good faith to comply with the terms of the statute, and was sufficient to avoid a continuance. If the appellant thought the copy of the account was not sufficiently specific, his remedy was by a rule upon the appellee to file a bill of particulars. McCarthey v. Mooney, 41 Ill. 300.

MR. JUSTICE ADAMS delivered the opinion of the court.

July 8, 1898, appellee commenced suit in assumpsit against appellant to the July term, 1898, which term commenced July 18th, and at the same time filed its declaration, consisting of the common counts, also what purported to be a copy of the account sued on, and an affidavit, as prescribed by section 36 of the practice act. S. & C. Stat., C 110, Par. 87.

July 20, 1898, the same being the third day of the term, appellant having been duly served, appeared by its attorney and moved the court for a continuance of the cause until the next term of the court, on the alleged ground that no copy of the account sued on had been filed, as provided by

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the statute, which motion the court overruled. Thereupon appellee moved the court for a default of appellant for appellant's failure to file a plea and affidavit of merits, when the appellant made a cross-motion for leave to plead. The court granted appellee's motion, overruled appellant's motion, entered an order defaulting appellant, assessed appellee's damages at the sum mentioned in its affidavit of claim, less ten cents, and rendered judgment for that amount against appellant.

The assigned errors are the overruling appellant's motion for a continuance, and the refusal of its motion for leave to plead, and rendering judgment against it by default. There was, as above stated, what purported to be a copy of the account sued on filed with the declaration ten days before the commencement of the term, which contained, among other items, the item: "To goods, wares and merchandise sold and delivered, \$1,000." The claim of appellee, as shown by the affidavit filed with the declaration, was for goods, wares and merchandise sold and delivered. The alleged ground of appellant's motion for a continuance being that no copy of the account sued on was filed, the motion was properly overruled. If appellee desired a more specific statement of account, he should have moved for such statement. *McCarthey v. Mooney*, 41 Ill. 300.

Appellee having filed an affidavit of its claim in accordance with section 36 of the practice act, it was incumbent on appellant, if it had a defense to the action, to file a plea and an affidavit of merits, and having failed so to do, it was in default.

Appellee's motion for judgment by default against appellant having been made before appellant moved for leave to plead, and appellant not having presented to the court any plea or affidavit of merits, but having merely made an unsupported motion for leave to plead, the court was fully warranted in overruling appellant's and granting appellee's motion. It is too late to plead, except by leave of court, after motion for a default. *Dunn v. Keegin*, 3 Scam. 292, 295.

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A copy of the account sued on having been filed, the court was fully justified in considering the motion for a continuance on the alleged ground that such copy had not been filed, was frivolous, and interposed only for delay. *Castle et al. v. Judson et al.*, 17 Ill. 381.

And although appellant might legally have pleaded before a motion for its default was made, without leave of court, it could not afterward without such leave. *Ib.* 384; *Cook v. Forest*, 18 Ill. 581.

Whether or not there is any rule of the Superior Court fixing the time to plead does not appear from the record. In the absence of such rule the time to plead was the first day of the term and it was a matter resting in the discretion of the court whether the time should be extended. *Culver v. Hyde & Leather Bank*, 78 Ill. 625.

Under the circumstances heretofore stated we think there was no abuse of discretion in refusing appellant's motion made on the third day of the term for leave to plead.

The judgment will be affirmed.

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**Chicago, M. & St. P. Ry. Co. and Chicago, St. L. & P.
R. R. Co. v. The City of Chicago.**

1. **ESTOPPEL—To Raise the Question of Several Liability.**—Where a city has a right of action against two railroad companies, severally, to reimburse itself for damages paid in satisfaction of a judgment rendered against it in favor of a property owner for damages sustained by reason of the construction by the railroad companies of approaches to a viaduct, such companies may by agreement consent to a joint proceeding against them by the city to determine their liability, and so estop themselves from raising the question as to the regularity of such proceedings.

2. **FRANCHISES—Sales—What the Purchaser Takes.**—It is not permissible for the purchaser of the franchises or easements of a railroad corporation, granted or acquired for a public purpose, to take and hold the privileges freed from the public duty imposed as the condition of the grant.

Assumpsit, on a contract of indemnity. Trial in the Superior Court of Cook County; the Hon. JOHN BARTON PAYNE, Judge, presiding.

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Finding and judgment for plaintiff; appeal by defendants. Heard in the Branch Appellate Court at the October term, 1898. Affirmed. Opinion filed May 26, 1899.

Statement of Facts.—The city of Chicago sued the appellants jointly, in assumpsit, to recover the amount paid by it in satisfaction of a judgment rendered in favor of a property owner and against the city, for land damages sustained by the land owner by reason of the construction of the south approach to Western avenue viaduct.

The viaduct, having both approaches in Western avenue, extended over Kinzie street, in which are located two tracks of the Northwestern road, two tracks of the appellant Milwaukee & St. Paul road, and three tracks of the appellant Pittsburg road. Two additional tracks of the last named road lie to the south of its tracks in Kinzie street, upon its private property, the viaduct extending over all nine tracks.

The rights of the appellants in Kinzie street were granted by two separate ordinances of the city. One of said ordinances contained a direct grant to the appellant Milwaukee & St. Paul road. The other ordinance contained a grant to the Columbus, Chicago & Indiana Central Railway Company, by whom the last mentioned five tracks were laid and for a time operated. Afterward, the appellant Pittsburg company, by foreclosure and *mesne* conveyance, became successor to the Columbus, Chicago & Indiana Central Railway Company, and thereafter owned and operated said five tracks.

Each of said ordinances contained the following conditions:

“The permission and authority herein granted are upon the express condition that the said Chicago, Milwaukee & St. Paul Railway Company shall annually, from the passage of this ordinance, erect and maintain two viaducts in each year over its said tracks, and the board of public works shall, in each year, on or before the first day of January, designate the streets over which such viaducts and approaches to said viaducts shall be constructed and maintained, the same to be built in such manner as the said board of public works shall direct; provided, however, that the

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said viaduct or viaducts shall have approaches thereto, on each side thereof, with the proper area on either side of said approaches; said approaches to have an elevation of not more than one foot to every forty feet in length thereof, and that said approaches to said viaducts shall likewise be erected and built by and at the expense of said railroad company. * * *

Sec. 5. The permission and authority hereby granted are upon the further express condition that the said Chicago, Milwaukee & St. Paul Railway Company shall and will forever indemnify and save harmless the city of Chicago against and from any and all damages, judgments, decrees and costs and expenses of the same which it may suffer or which may be recovered or obtained against said city for or by reason of the granting of such privileges and authority, or for or by reason of, or growing out of, or resulting from the passage of this ordinance, or any matter or thing connected therewith, or with the exercise by said company of the privileges hereby granted."

There was contained in the ordinance to the Columbus, Chicago & Indiana Central Railway Company, the following provision, which was not in the ordinance to the Milwaukee & St. Paul Company:

"Provided, however, that where any such viaduct can not be built at any such street crossing without the same be built over the track or tracks of some other railroad company or companies, then said company shall only be obliged to join with such other last mentioned railroad company or companies in the construction and maintenance of such viaduct, and to pay its fair proportion of the cost of such viaduct or viaducts, and if such other railroad company or companies shall not join in the erection of any such viaduct then, if the proportion of such other company or companies shall be otherwise provided, the said Columbus, Chicago & Indiana Central Railway Company shall pay its fair proportion of the cost of any such viaduct."

Several years after the granting of said ordinances the city desired that the viaduct in question should be constructed, and gave a separate notice to each appellant to commence, on January 2, 1888, the construction of such viaduct and approaches thereto, in accordance with the respective ordinances, and in accordance with plans and specifications in the office of the city engineer.

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Negotiations presumably ensued, and on May 18, 1888, a contract between the appellants as first and second parties, respectively, and the city as third party, was entered into. Such contracts recited the substance of the material facts, in respect of the matter in hand, of the said ordinances, and then stated the agreement to be as follows:

“ 1st. The said viaduct shall be constructed over the tracks of the first and second parties where the same are intersected by Western avenue.

2d. Said viaduct shall be constructed at said Western avenue in accordance with plans which are hereto attached and made a part of this agreement, the same having been agreed upon and approved by the engineers of the several parties to this agreement. The city of Chicago shall advertise for the letting of the contract for the construction of said viaduct and the approaches thereto, and let the contract to the lowest responsible bidder. The commissioner of public works shall have the right to reject any and all bids, and to re-advertise the same. The parties of the first and of the second part shall each have the right to bid on said contract.

3d. The work to be done upon and in connection with said viaduct and approaches shall be under the supervision and control of the commissioner of public works of the city of Chicago.

4th. The parties of the first and second part shall pay the entire cost of each of the south and north abutments and approaches thereto of the viaduct hereinbefore provided for at Western avenue, and shall also pay the entire cost of so much of said viaduct as may be constructed from the south and north abutments and approaches over the tracks and right of way of each of the parties of the first and second part; and the said parties of the first and second part will also pay the cost of engineering, of inspection of material and work, and the necessary expense of specifications and blue-prints, in the manner hereinafter provided; and the city of Chicago agrees that the viaduct over the tracks and the right of way of the Chicago & Northwestern Railway Company shall be constructed without any expense whatever to either the first or second party.

5th. The payment herein provided to be made by the parties of the first and second part shall be as follows: The payment for the two approaches, abutments and piers at the north and south sides of said viaduct, and the cost and ex-

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pense of the construction of so much of said viaduct as may be constructed from the north and south abutments and approaches over the tracks and right of way of each of the parties of the first and second part, also the cost of the engineering, inspection of material and work, and expense of specifications and blue-prints shall be made from time to time as the work progresses, to the holder of certificates of the city engineer of the city of Chicago, which certificates shall specify the amount in each certificate to be paid thereon.

6th. And inasmuch as the parties of the first and second part deny that under the ordinance hereinbefore referred to, they are liable to pay any land damages that may be recovered by reason of the erection and completion or construction of said viaduct, or any of the approaches leading thereto, at the street above named, it is agreed that the question whether the parties of the first and second part are liable to pay any land damages that may result in consequence of the construction of any viaduct, or any of the approaches, at the street above named, shall be determined by judicial proceedings, if the city of Chicago shall so elect, and if, upon final judgment, it shall be determined that under the ordinances aforesaid, or otherwise, the said parties of the first and second part are liable for the land damages aforesaid, then the parties of the first and second part agree that they will pay to the city of Chicago whatever sum the city of Chicago may have paid for land damages, or interest and costs, or any judgment obtained therefor, caused by the construction of said viaduct and the approaches thereto."

GEORGE WILLARD, attorney for appellant, C., St. L. & P. R. R. Co.

CHARLES B. KEELER, attorney for appellant, C., M. & St. P. Ry. Co.; Geo. R. PECK, of counsel.

CHARLES S. THORNTON and SAMUEL A. LYNGE, attorneys for appellee.

MR. JUSTICE SHEPARD delivered the opinion of the court.

The case was tried before the court without a jury, and from a finding and judgment for \$2,175.50 against the appellants and in favor of the city, this appeal is prosecuted.

There is no material dispute about the facts.

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The main contention is that there is no joint liability by the appellants, and that the action against them jointly was improper.

Prior to the making of the contract of 1888, each appellant company was, severally, expressly bound by the conditions of the ordinance under which it was operating its tracks in and upon Kinzie street and across Western avenue, to build the viaduct in question, and the approaches thereto on each side.

The only difference between their several liability in such respect was that the appellant Pittsburg company was only required to pay its fair proportion of the cost of the viaduct proper, whenever a viaduct should necessarily extend over the tracks, also, of another railroad company. Each appellant was liable for the entire cost of the approaches, and the viaduct also, except in the particular case just mentioned in favor of the appellant Pittsburg company.

And so was each company severally bound to indemnify the city and save it harmless against any and all damages, judgments, etc., by reason of the erection of all viaducts, including this one, and the approaches thereto. It was then the right of the city to call upon either or both of the appellants as was done, to construct this viaduct, and it is plain that they were then each liable in a several action, upon their obligations imposed by the ordinances and accepted by them.

Under such circumstances the contract of 1888 was entered into.

Then, for the first time, appellants assumed in some respects a joint contractual duty. What had theretofore been the several duty of each appellant, under their respective ordinances, to build the viaduct and approaches, was then agreed should be done by the city at their expense, and then the question of land damages being apparently raised, they agreed that if the city should have to pay any such damages, for which under the ordinances they were liable, they would reimburse the city to the extent of such payment.

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The liability of appellants for land damages, by reason of the construction of the viaduct and its approaches, arose out of or was created by the ordinances, either expressly or by implication. C., B. & Q. R. R. Co. v. City of Chicago, 134 Ill. 323.

Had the contract of 1888 been silent as to land damages, the incidental would have followed the main contract liability created by the ordinances. It was not necessary for any new obligation in such respect to have been created by the contract, and none such was created. Although the contract recited a denial by appellants of their liability for land damages, it, however, in no manner altered the law or the fact in that regard, and probably served no useful purpose, unless to negative some possible presumption or inference concerning their liability for such damages, or to serve as an introduction to their ensuing agreement to jointly indemnify the city to the extent it might have to pay such damages, if, notwithstanding their contention to the contrary, they should be held to their liability for land damages.

Judicial proceedings having determined the city's liability for such damages, and the city having paid them, appellant's agreement ripened, and the city's right to an action became perfect.

The obvious purpose of the sixth clause of the contract of 1888, and the only one that we can detect, was to substitute for the already existing several obligations of each of the appellants, their joint obligation in such respects. By it, what each was severally liable for before, was changed to a joint liability for. By it there was a waiver of appellants' previous right to be sued severally, and they ought to be treated as having estopped themselves from now asserting such earlier right. It is difficult to say what more apt words could have been employed to make the agreement a joint one than were used. Whether appellants were legally bound to pay land damages, severally or jointly, was their right to have settled by legal proceedings, no matter how plain their duty was in that regard, and the

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only reasonable interpretation to be put upon the sixth clause of their contract of 1888 is that they thereby consented to have such proceedings prosecuted against them jointly instead of severally, as, without the agreement, must have been done.

The right by the city to a several action against each of them already existed. Why contract anew that it should exist? Parties will not be considered as contracting idly.

The judicial proceedings which the contract of 1888 provided might, at the election of the city, be brought to determine the question of the liability of the appellants, were instituted by this joint action against the appellants, and, without intervening error of any substantial kind, it has been determined adversely to the appellants.

Counsel for the appellant Pittsburg company, makes the particular point that as between it and the city there is not any privity of contract or estate.

That company, as already said in the statement of facts, became successor to the Columbus, Chicago & Indiana Railway Company, to whom and to its successors the ordinances gave permission and authority to lay and operate tracks in said Kinzie street.

Counsel argue that because the conditions (concerning viaducts and indemnifying the city) of granting such permission and authority, do not in terms purport to bind the successors of the Columbus company, they are personal to that company and do not bind the Pittsburg company.

We regard the point as more ingenious than sound. It is not permissible for the purchaser of the franchises or easements of a railroad corporation, granted or acquired for a public purpose, to take and hold the privileges freed from the public duty imposed as the condition of the grant.

We have considered, although we have not commented upon, all questions presented by the record, and finding no substantial error, the judgment of the Superior Court will be affirmed.

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Chicago Exchange Building Co. v. Merchants' Building Improvement Co.

1. PRACTICE—*Effect of Improper Cross-Examination.*—It is in the discretion of the court to permit the defendant, upon cross-examination of the plaintiff's witnesses, to examine them in relation to matters not touched upon in the direct examination; but as to such matters the defendant, by so doing, makes the witness his own.

2. SAME—*Plaintiff Not Required to Introduce Matters of Defense.*—There is no rule of law which requires a plaintiff to introduce in evidence facts or papers which are strictly and only matters of defense.

Assumpsit, on a contract in writing. Trial in the Circuit Court of Cook County; the Hon. CHARLES E. FULLER, Judge, presiding. Verdict and judgment for defendant by direction of the court; appeal by plaintiff. Heard in the Branch Appellate Court at the October term, 1898. Reversed and remanded. Opinion filed June 9, 1899.

Statement.—In the latter part of the year 1892 negotiations were pending between parties variously interested in relation to the erection of a large office building at the southwest corner of La Salle and Washington streets in Chicago. It was in the interest of the owners of such building, if erected, and of the owners of property in that immediate vicinity, to have the Chicago Stock Exchange locate in such proposed building. To accomplish this, it was necessary to give to said Stock Exchange at least 6,000 square feet of space, rent free, for the term of fifteen years.

It seems to have been the accepted conviction that other parties than those who might erect such building, and who would be benefited, should bear a part of the loss incident to the furnishing of space to the Stock Exchange rent free. The estate of P. F. W. Peck owned a part of the ground upon which it was proposed to erect such building. The proprietors of said estate were active in promoting the project to have such building erected. One of them, Ferdinand W. Peck, procured an option to lease other ground adjoining that owned by said estate. Said Ferdinand W. Peck also procured and entered into an agreement with said

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Stock Exchange, whereby it was provided that said Stock Exchange agreed to locate in such building when constructed, and to continue there for the term of fifteen years without rent (that is, at the nominal rental of one dollar per annum).

To further the conservation of the project, appellee executed and delivered to Clarence I. Peck, also one of the proprietors of said estate, the agreement upon which this suit is brought, and which is in the words and figures following, to wit:

"Whereas, an effort is being made to secure the location of the Chicago Stock Exchange in a building to be erected upon lot one (1), and the east part of lot two (2), in block fifty-five (55), original town of Chicago, with a view of benefiting property interests in that vicinity;

And in order to induce it to locate there it will be necessary to offer a large amount of valuable office and room space, not less than six thousand (6,000) square feet, free of rent;

Therefore, it is proposed to erect upon said land a new fire-proof building with quarters adapted to the purposes of the Chicago Stock Exchange, and to furnish the same to it as stated.

Now, therefore, we, the undersigned, owners of buildings in the neighborhood of said property, do severally agree to pay annually the sums set opposite our respective names for and during the time that said Chicago Stock Exchange shall actually occupy the entire space of six thousand (6,000) square feet, or more, on the first or second floor, or both, of said proposed building, as its general stock exchange room, in which its stock exchange business is transacted; said occupation to be continuous and free of rent, and said payments are not to continue beyond the period of fifteen (15) years; said payments to be in consideration of the benefits to us of such location, and to be paid in equal quarterly yearly installments to the owner or owners of the premises where said Stock Exchange shall be located, upon satisfactory evidence being given as to who said owners may be, when required, towards providing a fair rental to the owners of the property for the space to be occupied by the Stock Exchange free of rent; provided one of the main entrances to said main stock exchange room shall be from Washington street. Said building to be erected and

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occupied by said Stock Exchange on or before January 1, 1895.

MERCHANTS' BUILDING IMPROVEMENT COMPANY,
By W. T. FURBECK, President.

Attest: \$2,500.

WALLACE HECKMAN,
Secretary.
(Corporate Seal.)"

Appellee was at that time the owner of the property at the northwest corner of said La Salle and Washington streets. At the same time the Chamber of Commerce Company was the owner of the property at the southeast corner of said La Salle and Washington streets. The last named company also executed and delivered to said Clarence I. Peck an agreement similar in effect to said agreement made by appellee. At the time of receiving said subscription contracts said Clarence I. Peck executed and delivered a receipt therefor in the words and figures following, to-wit:

"CHICAGO, Illinois, Dec. 2, 1892.

This is to certify that the undersigned has received from the Merchants' Building Improvement Company and the Chamber of Commerce Safety Vault Company, subscriptions each in the sum of \$2,500 per annum for fifteen years, on certain conditions, toward providing space on the west side of La Salle street, between Washington street and Calhoun Place, for the Chicago Stock Exchange, free of rent.

We hereby agree, in the event that we do not enter into a written contract binding upon the Chicago Stock Exchange to occupy said premises in accordance with the terms of the said subscription, and notify the said subscribers thereof before May 1, 1893, then the said subscription shall be null and void and the subscription papers above mentioned shall be returned to the respective subscribers.

ESTATE OF P. F. W. PECK,
By CLARENCE I. PECK,
Attorney."

Some of the proprietors of said estate also made various contracts in regard to the construction of such building. Early in 1893, the appellant corporation was formed. Thereupon said estate leased to the appellant corporation that portion of the ground upon which such building was to be erected, which was owned by said estate; said option

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to lease adjoining ground was assigned to appellant; the various contracts which had been made in regard to the erection of such building and said subscription contract of appellee, with others, were transferred to appellant. The appellant constructed the building as proposed, entered into a formal lease with said Stock Exchange, and contends that it met the conditions of said subscription agreement. This suit is in assumpsit, and appellee pleaded the general issue, and by stipulation might introduce evidence of any defense which it could have made by special pleas. No point is made upon the pleadings.

When the plaintiff below (appellant) rested its case, the trial court instructed the jury to find a verdict for defendant below (appellee), which was done accordingly. A motion for a new trial was duly made and overruled, and judgment entered against appellant for costs.

JOHN S. COOPER, CHAS. M. OSBORN and CHAS. M. OSBORN, JR., attorneys for appellant.

PECK, MILLER & STARR and HECKMAN, ELDON & SHAW, attorneys for appellee.

MR. JUSTICE HORTON delivered the opinion of the court.

Upon the trial of this cause, appellant called as a witness Wallace Heckman, the secretary of appellee, and proved by him the genuineness of the signature to the subscription contract sued upon, and then offered said contract in evidence. No question as to any other fact was then propounded by attorneys for appellant to said witness.

Upon the cross-examination of that witness, and against the objection of appellant, attorneys for appellee were permitted to and did enter somewhat at length into an examination of the witness as to the receipt signed in the name of the estate of P. F. W. Peck, by Clarence I. Peck, attorney, as to when and where it was executed, when, where and by whom, and to whom it was delivered, when, where and by whom it was prepared, and the conditions upon which said contract and said receipt was delivered. Said

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receipt was produced by the witness during such cross-examination. (By direction of the court said contract was marked "Plaintiff's Exhibit A," and said receipt "Defendant's Exhibit A.")

Said receipt was not offered or read in evidence. At the conclusion of appellant's testimony, and when it rested its case, attorneys for appellee made in writing the following motion, viz.:

"And now the defendant by its counsel moves the court, upon the close of the plaintiff's case, upon the trial of said cause, here now to exclude from the jury and evidence the paper writing marked 'Plaintiff's Exhibit A,' on the ground that the same is incompetent, and on the ground that the same has not been shown by the evidence to be the contract between the parties, and on the ground that the evidence shows that the same was not the contract of the defendant, and that the same was but a portion of the contract between the parties to the said contract."

After argument by the attorneys for both parties, the trial judge said: "I will now require the counsel for plaintiff to offer in evidence the other portion of this contract referred to as 'Defendant's Exhibit A,' if they desire to do so." Counsel for plaintiff declined to do so, and then the judge said, "And thereupon the motion of counsel for defendant is sustained, and 'Plaintiff's Exhibit A' is excluded from the jury."

In the record, following discussions by counsel, it is stated as follows, viz.:

"Thereupon the court instructed the jury as follows: "Gentlemen of the jury, it has become necessary, as a matter of law, for the court to exclude from your consideration the alleged written contract that was the basis of the action, and therefore I instruct you in writing as follows:

"Which instruction was in writing, and marked by the court 'Given,' and was read to the jury as follows:

"The court instructs the jury to find the issues for the defendant.

"The court further said to the jury: "Some one of your number, as foreman, may sign the verdict, which will be simply, 'We, the jury, find the issues for the defendant.' It is only a matter of law—failure of

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proof as it stands, for which the court has to assume the responsibility.

"Thereupon the jury rendered their verdict in writing, duly signed by their foreman, finding the issues for the defendant."

The contract sued upon provides that the payments therein provided for shall be made "to the owner or owners of the premises where said Stock Exchange shall be located, upon satisfactory evidence being given as to who said owners may be." The testimony shows, not only the completion of the building, and the lease with the Stock Exchange, etc., but it shows that appellant was "owner of premises where said Stock Exchange was located."

Said contract and said receipt are not of the same date, and are not upon the same paper, or attached together, but are physically entirely disconnected. Whether appellant had any knowledge of the existence of said receipt, or was chargeable with such knowledge, does not appear. The appellant corporation was not in existence at the time said receipt was given. Said contract was transferred and delivered to it with the contract for a lease with said Stock Exchange before it erected said building. Merely upon the face of the papers and without proof that appellant was in some manner bound by said receipt, it was error to hold that such receipt formed a portion of the said contract, in the sense and to the extent that unless appellant should introduce the same in evidence as a part of said contract, that then said contract would be excluded from the jury. The receipt does not on its face purport to cast upon the "owner or owners of said premises," to whom said contract runs, any duty or obligation. Whatever duty or obligation, if any, may have rested upon any one by reason of said receipt, in so far as appears by this record, was upon the estate of P. F. W. Peck, or said Clarence I. Peck.

From what we have said, it follows that it was error to exclude or withdraw said contract from the jury. If there were any facts so connecting said receipt with said contract, as, that appellant ought not to recover thereon by reason thereof, it devolved upon appellee to show such facts

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as a defense. No such facts appear upon the face of the papers.

It is perhaps not necessary for us to go further; but as the case must be reversed and remanded for another trial, we may state that the examination by the attorneys for appellee of the witness Heckman was not, in the main, cross-examination. It was in the discretion of the court, perhaps, to permit such examination of that witness at that time, but appellee thereby made him its own witness. And appellee did not avail itself of its right, at some time during the trial, to offer said receipt in evidence. We do not know of any rule which requires a plaintiff to introduce in evidence facts or papers which are strictly and only matters of defense. It was not incumbent upon appellant to introduce said receipt in evidence.

For the reasons indicated the judgment of the Circuit Court is reversed and the cause remanded.

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G. S. Thomas v. Anna V. Whitney et al., Ex'rs.

1. **EQUITY JURISDICTION—Over Persons in Fiduciary Capacities—Fraud.**—In all cases where a confidential relation exists between parties, and the transaction is prejudicial to the interest of the dependent or subordinate one, it will be held to be constructively fraudulent; and in the absence of clear proof that it was the deliberate act of the injured one done upon a full knowledge and understanding, it must be overthrown. Actual and intentional fraud need not be shown in order to overthrow such a transaction.

2. **FRAUDS—Unconscionable Acts by One Occupying a Superior Position, etc.—Measure of Proof.**—It is sufficient to show that the one occupying the superior position of confidence has gained an advantage in the dealing with the one occupying the dependent or subordinate position to throw upon him the burden of proving good faith and absence of influence by himself, and of knowledge, freedom of action and deliberate intention of the other.

Bill to Set Aside Conveyances, etc.—Trial in the Superior Court of Cook County; the Hon. FARLIN Q. BALL, Judge, presiding. Decree for complainant; error by defendant. Heard in the Branch Appellate Court at the October term, 1898. Affirmed. Opinion filed June 9, 1899.

PINNEY & ORR, attorneys for plaintiff in error.

JOHN F. HOLLAND, attorney for defendant in error.

MR. JUSTICE SHEPARD delivered the opinion of the court.

This is a bill in equity exhibited by R. U. Piper, in his lifetime, now deceased, against the plaintiff in error, for an accounting and to set aside certain conveyances of real estate by Piper to and for the use of plaintiff in error.

Facts about which there can be no material dispute are as follows:

Piper was a physician by profession, and a microscopist and handwriting expert by practice, and had arrived at about seventy-seven years of age, and was possessed of between forty and fifty thousand dollars in real estate, moneys and credits. The real estate was situated in Chicago and Washington, D. C.

In the fall and winter of 1892, he was temporarily residing in Saratoga Springs, New York, in feeble health. His wife died there in the first week of January, 1893, and he was joined there by Thomas, the plaintiff in error, on or about January 15, 1893. Piper had no children, but he had two brothers, one sister and six or eight nephews and nieces.

Thomas also was a physician by profession, but in later years had devoted himself mostly to the real estate business. He appears to have always maintained professional relationship with his brother physicians, and without holding himself out as a practicing physician, to have had occasional patients consult him at his house.

From about 1880 Thomas and Piper were acquaintances, and considerable business and social intimacy existed between them; and from that year to 1893, Thomas was Piper's agent concerning the latter's real estate in Chicago. Upon at least two occasions Piper and his wife visited at Thomas' house—once in 1888 or 1889, for about two weeks, and again in 1891, for about two months—and letters that passed between Mrs. Piper and Thomas and his wife were of a very friendly character.

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On January 12, 1893, Piper sent Thomas a peculiar letter from Saratoga Springs, written in what appears to have been a diseased condition of mind, embodying a request to Thomas to come there, and Thomas went at once, arriving there on January 14th or 15th.

Adopting Thomas' testimony, he found Piper without the presence of relatives and in a low condition, and after learning the medical treatment to which he had been subjected, he, Thomas, took charge of the case and changed the treatment radically. Piper improved, and Thomas brought him to Chicago, arriving at Thomas' house about January 28th, where for some weeks, as Thomas testified, Piper's "life hung in the balance; * * * for the first two weeks he was almost perfectly helpless."

From that time forward, until June, 1895, Piper's home was at the house of Thomas, in Chicago, and so far as we can discover from the evidence, he was well nursed, and his wants as well attended to as might reasonably be expected in the house of a private family in comfortable circumstances. During all that time he was a feeble old man and more or less an invalid, and in the early part of the time, at least, he was flighty, and not intellectually clear. Whatever may have been Piper's mental condition after about April, 1893, he seems never again to have become strong enough physically to be trusted alone outside of Thomas' house, and Thomas was his customary attendant when he did go out.

On a few occasions Thomas called in other physicians to see Piper, but the principal nursing and medical attendance given him were rendered by Thomas.

June 25, 1895, Piper left Thomas' house and went to his relatives in Maine, where he died, before the entry of the decree herein in May, 1896. This suit was begun by him in November, 1895, and he testified herein, by deposition, in February, 1896.

Between February, 1893, and November of the same year, while Piper was in the care of Thomas, as has been stated, certain financial and other business transactions

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occurred between them. They are stated by the learned judge of the Superior Court who entered the decree appealed from, in consecutive order, and are adopted by us, as follows:

"At this time Piper had real estate in Chicago and Washington to the value of \$34,000, cash over \$5,000, and a claim against the Sharon estate for witness fees of \$9,000.

On February 20, 1893, Thomas got from Piper an order allowing the former access to the safety deposit box of the latter, in which was \$5,000 in cash. Within a month thereafter, Thomas took from such box \$3,000 and converted the same to his own use, giving Piper a receipt therefor to the effect that such sum was due him for services and medical attendance from the time he reached Saratoga to April 1, 1893. Both the order and the receipt are in the handwriting of Thomas, the order being signed by Piper.

On March 3, 1893, Thomas drew up a paper authorizing him to collect the \$9,000 then due from the Sharon estate to Piper, fixing the fee for such collection at \$3,000. This paper Piper signed and handed back to Thomas. The evidence shows that this money was ready to be paid by the estate upon proper vouchers being presented. The matter was arranged by Thomas by letter, and within a month the \$9,000 was in Piper's account in Chicago. For some unexplained reason, when Thomas drew a check for the signature of Piper for this fee it was for \$2,200, and not for \$3,000.

April 10, 1893, Thomas, without legal aid or guidance, drew up in his own handwriting a will for Piper, which was signed and duly attested. By this instrument the wife of Thomas received a bequest of \$5,000, his daughter was bequeathed Piper's microscope with the apparatus connected therewith and \$1,000 in cash, the sister-in-law of Thomas was bequeathed \$300 in money, and the niece of Thomas was bequeathed \$500 in money and Piper's typewriting machine, while Thomas was appointed his executor with fees of not less than five per cent upon all amounts by him handled.

October 18, 1893, another will was executed and acknowledged by Piper. The handwriting of this instrument is not identified. The paper written upon is of the identical and peculiar make as is that of the prior will, and the cover of each will is unusual and the same in kind. This last will, after giving to the sister-in-law \$100, to the daughter the

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microscope, to the niece the typewriting machine, makes Mrs. Thomas residuary legatee.

In each of these wills the brothers and sister of Piper received bequests, but in neither case do they amount to one-third of the estate.

In October, 1893, Thomas went to one of our most experienced and able lawyers, and directed him to draw a deed for the support of Piper during life by Thomas. The result was that October 13, 1893, a deed was signed and acknowledged by Piper, by which he conveyed to Thomas the real estate in Chicago and in Washington, in consideration that Thomas would give him a home as long as he lived; with a proviso that in case Piper at any time desired to leave the Thomas home, he would pay Thomas at the rate of two thousand dollars per year for the time he there remained.

Eight days after the date of this deed Piper gave Thomas a check for two thousand dollars."

The theory upon which the bill was filed to set aside the foregoing transfers of money and real estate, was that they were made by the complainant Piper, when he was upward of seventy-seven years of age, feeble in mind and body from long-continued illness, and broken in spirit by the death of his wife, which had recently occurred, and while he was an invited guest in the house of Thomas, and under his care as physician, and was employing him as a trusted agent; and that such transfers were brought about by the fraud and undue influence of Thomas, and were not the voluntary acts of complainant, and that they were made on grossly inadequate and unconscionable considerations.

The bill offered to pay to Thomas a reasonable sum for his board, care and attendance rendered Piper.

Thomas, by his answer, admitted the receipt of the mentioned moneys, and the execution and delivery of the conveyance of the mentioned real estate.

These several transactions occurred during the first nine months of Piper's residence with Thomas. For substantially all traveling and other expenses, Piper had furnished the necessary additional funds. In considering these matters it should be kept in mind that Piper was not only far advanced in years and feeble in health, but that his previous habits were prudent and economical.

His board and room at Saratoga was at the rate of nine dollars a week, and his physician's bills there were moderate in amount. Nor was his property of such large value as to warrant great prodigality in supplying his personal needs.

The theory of Thomas' defense is that Piper voluntarily, deliberately and with full comprehension of his acts, made these several payments of money and transferred all his real estate.

To make out such a defense, under the existing circumstances, the burden rests heavily upon Thomas to demonstrate the fullest deliberation by Piper and the most abundant good faith by himself. Carter v. Tice, 120 Ill. 277.

To aid his own testimony, Thomas relies upon the testimony of brother physicians, who answer hypothetical questions as to the value of physician's services, and upon writings prepared by himself and signed by Piper. As to such writings, Piper's testimony is in effect a denial of their genuineness, or of his knowledge of what he was doing when he signed them.

According to Thomas' contentions, and his testimony, the \$3,000 taken by him from the safety deposit box in March, 1893, was for medical attendance, board and care of Piper for a period of less than eleven weeks, and until April 1, 1893, and a receipted bill to that effect was given by Thomas to Piper. It is at the rate of \$40 a day.

The item of \$2,200 received by Thomas April 12, 1893, has been sufficiently mentioned in the quoted part of the opinion delivered by the trial judge. The services for which that sum was charged by Thomas appear to have been merely formal.

The \$2,000 which Thomas received October 26, 1893, was, as he contends, to pay for the erection of an annex to his residence, built at Piper's request, in order that he might more conveniently continue to make his home with Thomas and enjoy more commodious quarters there.

About a week before the check for this \$2,000 was given to Thomas, the deed of the real estate in Washington and Chicago was made by Piper to Moore for the benefit of

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Thomas. The provisions of that deed are sufficiently stated in the quoted opinion by the trial judge, but it may be added that Thomas did not file the deed for record until June 17, 1895, which was a few days before Piper went away from Thomas' house to live with his relatives.

Coming back to the \$2,000 item, Thomas testifies that he gave no receipt for it until August 6, 1894; that on that date Piper asked for a receipt for the amount and requested it to be dated to correspond with the date of the bank check, October 26, 1893; that thereupon he drew a receipt and signed it, and at the same time drew the declaration which bears Piper's signature on the back of the receipt. The receipt and indorsement thereon are as follows:

“\$2,000.00.

CHICAGO, Oct. 26, 1893.

Received of R. U. Piper, two thousand dollars, with which to put an addition to house, No. 2930 Lake Park avenue, which addition is a part of our agreement, not expressed in the deed to George Moore, which at the request of Dr. Piper we kept to ourselves, as we did not consider it necessary to be a part of the same, as said addition is for his use.

G. S. THOMAS.”

“The within spoken (2,000.00) two thousand dollars was not paid to Granville S. Thomas as part payment on board, but as a bonus to get him to accede to the terms made in the agreement, and used to make a good place for me. The sum is not to be charged to Thomas, but to be considered as a bonus only.

R. U. PIPER.

CHICAGO, August 6, 1894.”

Aside from these two writings and Thomas' testimony, there is no evidence that Piper ever agreed to pay for the annex or any part of it. He explicitly denies that he ever requested the addition to be built or agreed to pay for it; and he denies all knowledge of any such transaction as the two writings tend to evidence, except that he understood the original check given by him was for a loan to Thomas.

Not only the body of these writings, but all others that are involved in the present record, except the deed of the real estate, are in the handwriting of Thomas.

These two papers were written by Thomas between seven and eight months after the real estate deed had been exe-

cuted by Piper. By the conditions of that deed, the least compensation that Thomas should receive for taking care of Piper was \$2,000 a year, or about \$40 a week.

If effect is to be given to Piper's declaration upon the back of the receipt, he would pay an additional \$2,000 for what the deed had already made magnificent provision.

Thomas had thus received from Piper, within the short space of nine months, in cash, \$7,200; he had also received a deed conveying all Piper's real estate, worth over \$30,000, which was to become his absolutely at Piper's death, if Piper continued to spend the balance of his lifetime with him, but if not, then to stand as security for his board and care at the rate of \$2,000 per year so long as he should live with Thomas.

These various transactions, occurring while Piper was Thomas' patient and an inmate of his house, had taken from Piper about all the property he was owner of less than nine months before, and if he had died before being rescued from Thomas by his relatives, Thomas would have been the possessor of it all. The facts, alone, constitute the severest condemnation of Thomas that can be expressed.

The law also speaks, with no uncertain disapproval, concerning such transactions.

They ought not to be upheld even if Piper had been of sound mind and business capacity when they occurred—which Thomas has far from succeeded in establishing—simply because of the relationship of physician and patient existing between the two.

"It would have been the bounden duty of the defendant to have declined" such extravagant compensation. Popham v. Brooke, 5 Russell (Eng. Ch.), 8.

The more surely the relationship of physician and patient existed, which Thomas contends is the basis of his right to the large charges he has made, the more certainly under the law must his claim meet with defeat. Once establish the existence of the fiduciary relation, and the law immediately steps in and raises a presumption of the invalidity of the transaction which nothing short of clear proof of its fairness can overcome.

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The case of *Billings v. Southee*, 9 Hare (41 Eng. Ch.), 534, was that of a medical attendant who had taken from a prior patient a promissory note for an amount beyond what was due him upon the most extraordinary scale of charges. The vice chancellor there said:

“No part of the jurisdiction of the court (equity) is more useful than that which it exercises in watching and controlling transactions between persons standing in a relation of confidence to each other; and in my opinion this part of the jurisdiction can not be too freely applied, either as to the persons between whom, or the circumstances in which it is applied.

The jurisdiction is founded on the principle of correcting abuses of confidence, and I shall have no hesitation in saying it ought to be applied, whatever may be the nature of the confidence reposed, or the relation of parties between whom it has subsisted. I take the principle to be one of universal application, and the cases in which the jurisdiction has been exercised—those of trustees and *cestui que trust*—guardian and ward—attorney and client—surgeon and patient—to be merely instances of the application of the principle.”

See also *Dent v. Bennett*, 4 Mylne & Craig (18 Eng. Ch.), 269; *Woodbury v. Woodbury*, 141 Mass. 329.

In all cases where a confidential relation exists between parties, and the transaction is prejudicial to the interest of the dependent or subordinate one, it will be held to be constructively fraudulent; and in the absence of clear proof that it was the deliberate act of the injured one done upon full knowledge and understanding, it must fall. Actual and intentional fraud need not be shown in order to overthrow the transaction.

It is sufficient merely to show that the one occupying the superior position of confidence has gained an advantage in the dealing, to throw upon him the burden of proving good faith and absence of influence by himself, and of knowledge, freedom of action and deliberate intention by the other. *McParland v. Larkin*, 155 Ill. 84.

These several transactions were grossly injurious to Piper, and owing to his old age and feebleness in mind and body, have but very little to sustain them. Thomas has com-

pletely failed to justify their fairness. The burden of doing so was upon him, and they must stand condemned.

The Superior Court, having acquired jurisdiction to set the transactions aside and rehabilitate Piper in his rights, very properly proceeded to do equity to Thomas and allow him all that was justly due him, as the bill offered might be done. The decree was only for the doing by Thomas of what was right after allowing to him everything that in equity and fair dealing he was entitled to, and it is affirmed.

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George W. Saul v. William R. Busenbark.

83 256
s184 343
83 256
s106 107
83 256
110 424

1. EMPLOYER AND EMPLOYEE—*What Creates No Legal Liability.*—The fact that services rendered by an employe to his employers result in a benefit to a third person creates no legal liability on the part of such third person to the employe when such third person is one of the common employers.

2. IMPLIED CONTRACTS—*Without Agreement of the Parties.*—There can be no implied contract where there is no agreement of the parties, but such an agreement may be inferred or may be presumed from facts and circumstances showing an intention.

Assumpsit, for commissions. Trial in the Circuit Court of Cook County; the Hon. ELBRIDGE HANECY, Judge, presiding. Finding and judgment for plaintiff; error by defendant. Heard in the Branch Appellate Court at the October term, 1898. Reversed. Opinion filed June 9, 1899.

DARROW, THOMAS & THOMPSON, attorneys for plaintiff in error.

WINSTON & MEAGHER, attorneys for defendant in error; JAMES F. MEAGHER and RALPH MARTIN SHAW, of counsel.

MR. PRESIDING JUSTICE FREEMAN delivered the opinion of the court.

This is an action in assumpsit in which it is sought to recover commissions from plaintiff in error and compen-

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sation for services claimed to have been rendered at his request.

The case was by agreement submitted to the court without a jury.

The defendant in error, Busenbark, was seeking to do business as a broker in New York City. An arrangement was made between him and plaintiff in error by which the two came to Chicago, and here, Busenbark introduced Saul to Mr. John R. Walsh and Mr. Andrew McNally, whom it sought to interest in a matter Saul had in hand. As a result a contract was made between the three last mentioned. At that time Saul owned or controlled nine thousand shares of stock of the Cleveland, Akron & Columbus Ry. Co. This was not a majority of the shares, and other parties in New York were seeking to obtain the controlling interest. Saul believed that if they succeeded, the value of his stock would be impaired, and was apparently seeking for money or co-operation to enable him to obtain stock enough to secure control for himself, or for a combination with which he should be connected. A contract and pooling arrangement with Walsh and McNally was made for this purpose. Aside from the stock held by his New York antagonists, the balance of the power was with the stock then owned in Holland. By the terms of their contract with Saul, Walsh and McNally agreed to advance the money necessary to acquire a majority of the whole issue of stock, to be purchased, if possible, upon terms satisfactory to them. It was provided that any expense incurred in attempting to purchase stock should be paid—two-fifths by Saul and the remaining three-fifths by Walsh and McNally.

Busenbark was selected to go to Holland to buy stock, and Mr. Walsh furnished him a letter of credit in behalf of the three contracting parties who were to defray his expenses. The instructions with reference to the purchase of stock were to come from Mr. Walsh, who represented the other parties. No arrangement was made as to whether Busenbark was to receive anything for his services. He says he "was willing to leave that with those gentlemen."

His mission to Holland proved a failure. He could not buy the stock there, and was also unable to pool the stock held there with that held by his principals here.

By its terms the agreement between Walsh, McNally and Saul expired with the failure of the combination to purchase the additional stock within two months. A day or two before the expiration of that time, Saul received an advantageous offer for his stock from the opposing or Brice interest in New York, and with the consent and upon the advice of Mr. Walsh, sold out his nine thousand shares of stock at a figure considerably above what he could have obtained two months earlier.

It is now sought to recover from Saul for Busenbark's services, which it is claimed enhanced the value of Saul's stock and enabled him to obtain this additional price.

That the formation of the pool and the negotiations carried on in Holland did have some influence in that way, seems highly probable. Such is Mr. Walsh's opinion, who testifies that he told Saul that Busenbark's visit over there had helped him handsomely, and that Saul should pay Busenbark handsomely for what he had done. He also says that he told Busenbark, when the latter was going to Holland, that if he could not buy the Amsterdam stock he "expected he ought to help Saul out by keeping it from going to Brice," who it is said was also trying to buy this Holland stock. It is claimed that Busenbark's presence in Holland had a tendency to prevent Brice's success, and finally compelled him to protect himself by buying Saul's stock at an advance of ten dollars a share, amounting to \$90,000.

Whether this sale was owing to Busenbark or not, the evidence does not clearly show. It seems to have been doubtful whether Brice could have obtained the Holland stock, even if Busenbark had never gone there. A letter written to Saul by Mr. Walsh the day after his return to London from a visit made by him to Amsterdam while negotiations were still in progress, says:

"The Amsterdam people talk very bitterly about Brice, and it is my opinion that it would be difficult for him to

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buy the whole block, if it was for sale, at any price. If 12,000 shares or more are deposited in the new trust, it is my judgment that Brice is done for, as the Amsterdam people will not combine with him, while they are willing to come in with us. I have no doubt that this number of shares will be deposited, but all the same if you can get Brice out by paying him twenty it will be a good thing to do. We have made some pleasant relations in Amsterdam and can, I think, work with them, but the profit, if any, is to come from buying up Brice, and to do this at a low price will be easier when he comes to understand that the Amsterdam people will have nothing to do with him."

This seems to indicate that the effort, if such effort there was, to keep the Amsterdam people from selling out to Brice was made in behalf of the combination by which Busenbark was sent to Holland, and not solely to promote the private interest of Saul.

Saul, however, did recognize that the combination with Walsh and McNally had been of service to him, because he acceded to Walsh's suggestion that he himself ought in fairness to bear all of Busenbark's expenses, although by the terms of the contract he was to bear only two-fifths. Saul repaid Walsh the whole amount, two thousand dollars, which the latter had advanced.

From the evidence, therefore, it appears that Busenbark was instrumental in introducing Saul to Walsh and McNally, but that thereafter during the trip to Holland he was in the employ of the combination and not of Saul individually. Whatever advantage accrued to Saul from the trip to Holland appears to have resulted from the efforts of the combination, and it is clear that Busenbark is not legally entitled to compensation from Saul because of his work while in the employ of the combination. The benefit received from the European negotiations may have been the indirect result of the formation and operations of the pool, but we know of no legal ground for holding that services rendered by an employe to his employers, because they result in benefit to a third party, can create a legal liability on the part of such third party to the employe even when, as in this case, the third party was one of the common employers.

The truth seems to be that Busenbark went to Holland and gave his time in the service of the combination without any arrangement whatever for compensation, in the same way and for the same purpose that Walsh and McNally made the arrangement with Saul, namely, in the expectation that if the scheme succeeded he would profit thereby. However that may be, his claim upon Saul was originally made, according to his own testimony, "for a settlement for my services in Europe under our contract or arrangement," and his services in Europe were, as we have seen, rendered to the combination, not to Saul individually.

His claim in this suit is for one-half of the alleged profit made by Saul upon the sale of his stock, which Busenbark estimates at \$44,000, and is based upon an alleged "understanding" made at the Gilsey House, New York, in May and June, before the trip to Chicago and Holland. It is conceded, however, by Busenbark's counsel, that no express contract by Saul to pay for Busenbark's services is established, and it is clear that there was no individual liability for the European services, no matter what may have been the moral obligation.

The judgment in this case is sought to be justified under the *quantum meruit*. It is said the trial court found that there was "an implied contract of hiring." But there can be no implied contract where there is no agreement of the parties. Although this agreement be not formally expressed, such an agreement may be inferred, or may be presumed from facts and circumstances showing such intention; and the contract thus proven is called an implied contract. But in this case no intention to make a contract of hiring is shown, and no implied contract is proven. If it appeared from the evidence that Busenbark had been employed by Saul, and the terms of the contract of hiring only were in dispute, then the employe might perhaps recover the value of his services under a *quantum meruit*, no express contract as to the compensation for the services being proven. But in this case it appears that the services for which it is sought to recover were rendered, not to plaintiff in error, but to

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the combination. The evidence shows no contract of hiring, either express or implied, between Busenbark and Saul. In the absence of such contract, the fact that Saul received benefit from Busenbark's visit to Holland in the employ of other parties does not entitle the latter to recover in this action.

In view of what has been said it is unnecessary to consider in detail other specific points discussed at some length by counsel. There being no legal liability under the facts as they appear from the evidence in behalf of plaintiff in error, the judgment of the Circuit Court must be reversed.

William M. R. Vose v. Northwestern L. & B. Ass'n et al.

1. **FREEHOLD**—*When Involved*.—A freehold is involved where the primary object of the suit is the recovery of a freehold estate, the title of which is in issue, and where the suit, if prosecuted to a final result, is, one gains and the other loses the estate.

2. **SAME**—*In Voluntary Assignments*.—An order of the County Court disposing of an assignee's interest in real and personal property, by which he is divested of the title which the assignment vested in him, involves a freehold, and an appeal lies to the Supreme Court.

Voluntary Assignment.—Error to the County Court of Cook County; the Hon. ORRIN N. CARTER, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1898. Writ dismissed. Opinion filed June 9, 1899.

Statement of the Case.—The defendant in error, the Northwestern Loan & Building Association, made an assignment to plaintiff in error August 6, 1895; ostensibly for the benefit of its creditors. The same day the plaintiff in error filed his bond as assignee. He continued to act as such assignee until October 1, 1895, when the County Court entered an order removing him as such assignee and appointing in his stead the defendant in error T. N. Jamieson. Plaintiff in error caused a writ of error to be issued out of this court to the County Court, for the purpose of having

said order removing him as such assignee reviewed by this court. October 22, 1896, said order was reversed by this court, but said cause was not remanded. See *Vose v. Cratty*, 66 Ill. App. 472.

August 16, 1895, Alfred E. Manning filed his bill in chancery in the Circuit Court of Cook County, praying, among other things, for the appointment of a receiver of said Loan & Building Association. September 13, 1895, said Jamieson was appointed such receiver by order of said Circuit Court. During the time said suit in error was pending in this court, said Jamieson continued to act as such assignee, and until September 18, 1896. September 17, 1896, the order was entered to reverse which this writ of error is prosecuted. By that order said Jamieson, as such assignee, was directed to turn over, assign, convey and deliver to said Jamieson as such receiver all the property and assets in his hands as such assignee, and that upon so doing he be fully and finally discharged as such assignee. No supersedeas was issued by this court in said error proceeding. September 18, 1896, an order was entered by the County Court discharging said Jamieson as such assignee from any further duties, liabilities or obligations, said Jamieson as assignee having, it seems, conveyed the real estate and other property as directed by said order of September 17th.

The title to a large amount of real estate passed by said deed of assignment to plaintiff in error, and under and in pursuance of the orders of said County Court, passed from plaintiff in error to said Jamieson as assignee, and from said Jamieson as assignee to said Jamieson as such receiver.

WHITEHEAD & STOKER and FRANK B. DRAPER, attorneys for plaintiff in error.

JOSIAH CRATTY, attorney for defendant in error the N. W. L. & B. Ass'n; E. M. ASHCRAFT and THOMAS CRATTY, attorneys for defendant in error Jamieson; C. E. CLEVELAND, of counsel.

MR. JUSTICE HORTON delivered the opinion of the court. Defendants in error moved this court to dismiss this

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cause on the ground that a freehold is involved, and that therefore this court is without jurisdiction. That motion was reserved to the hearing. It must now prevail.

The statute provides, in substance, that this court shall not entertain jurisdiction in cases involving a freehold, and that in such cases an appeal shall lie directly to the Supreme Court. (Hurd's Stat., Ch. 37, Sec. 25.) Whether a freehold is involved in a particular case has been frequently before the courts of this State. A freehold is involved "where the primary object of the suit is the recovery of a freehold estate, the title whereof is directly put in issue, and where the suit, if prosecuted to a final determination, will, by virtue of the judgment or decree rendered therein, as between the parties, result in one gaining and the other losing the estate." C., B. & Q. R. R. Co. v. Watson, 105 Ill. 217 222.

That case has been frequently cited with approval, and the rule there stated may be considered as the settled law of this State. Van Meter v. Thomas, 153 Ill. 65; Howe v. Warren, 154 Ill. 227, 253.

By reference to the record and files in the case of Vose v. Cratty (66 Ill. App. 472), we find that the order of September 17, 1896, now before this court upon this writ of error, was before the court in that case. Defendants in error in the former case moved this court to dismiss the same. In his suggestions filed in opposition to that motion, plaintiff in error, by his attorneys (the same attorneys appearing for him now), made the following statement, viz.:

"The order entered by the County Court in the Cratty petition was a final order. It disposed of all of Vose's interest in the matter. He was divested of the title to the property which the assignment vested in him."

This being true, it can hardly be contended that a freehold is not involved in the case now before this court. The purpose, as well as the effect of sustaining the view of plaintiff in error, would be to divest the title of Jamieson as receiver to real estate, and re-invest the same in plaintiff in error. This court has no jurisdiction in this case.

By the final order of this court in Vose v. Cratty, *supra*, the

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order removing plaintiff in error as assignee was reversed, but there was no remanding order. No supersedeas had been ordered or granted in that case. By reference to the opinion of the court, we find this statement, viz.:

"But since the writ was sued out, all the creditors have been paid, all the property disposed of, and all proceedings in the County Court ended. There is no longer in that court anything to which a remand of this cause could attach."

The order, to reverse which this writ of error is prosecuted, was before the court in the Cratty case.

Whether the Cratty case is *res adjudicata* as to the plaintiff in error, and also whether this court has jurisdiction for the reason that plaintiff in error had no standing in the County Court when this writ of error was sued out, may be doubted. But as the motion to dismiss for want of jurisdiction must be sustained because a freehold is involved, we do not deem it necessary to determine the questions thus presented.

The motion to dismiss the writ of error for want of jurisdiction because a freehold is involved, is sustained, and the writ dismissed.

Delos W. Eldred v. Dorothea Moehring, Mary Moehring and Fryer Marwood, Executor of the Last Will of Louis Moehring.

1. EXECUTION SALES—*Inadequacy of Price*.—Mere inadequacy of price is not ordinarily sufficient to justify setting aside a sale under execution, and permitting the judgment debtor to redeem after the statutory period of redemption has expired, but it will, if gross, be sufficient, when taken in connection with other, and sometimes even slight, circumstances of irregularity in the mode in which the sale was conducted.

2. SAME—*Irregularities of the Officer*.—The fact that the homestead was not set off, as required by the exemption laws, is an irregularity which, taken in connection with inadequacy of price, is sufficient to justify the setting aside of the sale.

3. PARTIES—*Executors, When Not Necessary*.—When the executor takes no interest in the real estate of the deceased he is not a necessary party in litigation concerning such real estate.

Eldred v. Moehring.

Bill to Redeem from an Execution Sale.—Trial in the Superior Court of Cook County; the Hon. THEODORE BRENTANO, Judge, presiding. Decree for complainant; appeal by defendants. Heard in this court at the October term, 1898. Affirmed. Opinion filed June 12, 1899.

Statement of the Case.—The bill of complaint in this cause was filed by appellees jointly, to set aside a deed issued by the sheriff of Cook county on October 17, 1893. The bill alleges that on the 26th of March, 1892, one Rhodes recovered a judgment in the Circuit Court of Cook County against Louis and Dorothea Moehring for \$455.62 by confession of judgment note; that execution issued, and on July 12, 1892, the sheriff sold the premises in question under the execution to Rhodes; that at the time of the levy and sale Dorothea Moehring was occupying the premises as a homestead, and that on the 17th day of October, A. D. 1893, the sheriff issued to the appellant a deed to the premises as the assignee of Rhodes.

It is further alleged that the premises at the time of the sale were worth \$20,000 and were incumbered for \$2,500, and that the complainants knew nothing with reference to the sale; that the sheriff did not have the premises appraised or set off the homestead; and that because of this fact, and because the property was sold for an inadequate price, therefore the complainants ask that the sheriff's deed and sale be set aside and they allowed to redeem.

The answer of appellant admitted the allegation as to the sale, that no homestead was set off, and that the premises were worth in excess of \$1,000. The answer avers that appellee Marwood, executor of the last will of Louis Moehring, deceased, had no interest whatever in the property, and that he was improperly joined as a complainant.

Appellee filed a cross-bill, asking that the homestead be set off. The trial court made no disposition of the cross-bill, but upon hearing on the original bill, answer and replication, decreed in substance that the sale by the sheriff was irregular, not in accordance with the law, and for a grossly inadequate sum. The decree finds that the value of the premises at time of sale by the sheriff was from \$15,000

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to \$20,000; that the sale by the sheriff to Rhodes was for \$491.12; that Dorothea Moehring, one of appellees, was at the time of the levy and sale occupying the premises as a homestead; and that no homestead was set off to her as provided by law. The decree permits appellee to redeem upon payment to appellant of the \$491.12, with interest, costs, etc.

ARNOLD TRIPP, attorney for appellant.

BARNES, BARNES & BARTELME, attorneys for appellees.

MR. JUSTICE SEARS delivered the opinion of the court. There is no dispute as to the facts alleged by the bill of complaint in relation to the homestead right of appellee Dorothea Moehring. It is admitted that no appraisers were appointed and no steps taken to have the homestead set off, and that the requirements of the statute in that behalf were in no manner complied with. The evidence is conflicting as to the value of the land. But we are of opinion that the finding of the chancellor is supported by the preponderance of the evidence. The only question presented is as to whether the great inadequacy of price, taken together with the irregularity of the sale, in that the homestead was not set off, and no attempt was made to comply with the requirements of the statute relating to sales of homestead on execution, is sufficient to warrant the relief granted. We regard the decision in Bullen v. Dawson, 139 Ill. 633, as absolutely disposing of any question in this behalf. The facts of that case were so similar to the case here, and the decision is so clearly in point, that we view it as controlling. The court said in that case:

"While mere inadequacy of price is not ordinarily sufficient to justify setting aside a sale under execution and permitting the judgment debtor to redeem, after the statutory period of redemption has expired, the rule is that such inadequacy of price, if gross, will be sufficient, when taken in connection with other, and sometimes even slight circumstances of irregularity in the mode in which the sale was conducted. It can scarcely be pretended that the fail-

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ure of the sheriff to take the steps prescribed by the exemption law before selling the premises in question, was not an irregularity, or that it was not prejudicial to the complainant. Property can be sold for the highest price only when the sale is legal and regular. No competition in bidding is likely to arise when the sale attempted to be made is one which will be void in law, and only confer upon the purchaser an equitable right," etc.

In that case the price bid at the sale was \$338.65, and the evidence tended to show that the value of the land above incumbrances was many times as great. The same can be said of the relation of price to value in the case here. And in this case, as in the cases cited, there was no demand for payment of the judgment and no notice given that a sale was to be made.

We are of opinion that the joinder of Marwood, the executor, as a party complainant, should not operate to altogether reverse this decree, which is substantially correct. The rights and equities of appellant have not been prejudiced by the error.

The decree will be affirmed in all other particulars, and the cause remanded, with directions to the Superior Court to modify the decree by ordering the bill of complaint dismissed as to complainant Fryer Marwood, executor of the last will of Louis Moehring, deceased. Affirmed in part and reversed in part.

Farmers Trust Co. v. John F. Schenuit.

1. PROMISSORY NOTES—*Presumptions as to Performance of Conditions Attached.*—Where a promissory note contains conditions, and is executed in a foreign State, but made payable in this State, the presumption is that its conditions were made with reference to the law of this State.

2. SAME—*Presumptions as to Assignments Made in Other States.*—Our courts will presume that the assignment of a promissory note was made in conformity to the law of the place where made, and will so hold in the absence of a plea and proof to the contrary.

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8. FOREIGN LAWS—*When Relied on as Defenses.*—When a foreign law is relied upon, either for the prosecution or defense, the law must be pleaded and proved.

4. INDORSEMENT—*Defined.*—Indorsement means a writing upon the back of a bill or note, and though such is its import, it may be made on the face of the bill or note, or on a separate paper, called an *allonge*, and any form is sufficient which manifests an intention to transfer the note.

5. WAIVER—*Of Notice of Transfer of a Promissory Note.*—Where by the terms of a guaranty upon a promissory note, the guarantor is entitled to written notice of its transfer, such notice is waived by the acceptance of payments in person of the interest coupons attached to the note by the transferee.

Assumpsit, on a promissory note. Trial in the Circuit Court of Cook County; the Hon. RICHARD W. CLIFFORD, Judge, presiding. Finding and judgment for plaintiff; appeal by defendant. Heard in the Branch Appellate Court at the October term, 1898. Affirmed. Opinion filed May 26, 1899.

Statement of the Case.—This is an action in assumpsit upon a promissory note and guaranty, which are as follows:

"No. 759. \$450

OAKDALE, NEBRASKA, April 27, A. D. 1889.

On the first day of May, A. D. 1894, without grace, for value received, we promise to pay, with exchange on New York, to the order of the Farmers Trust Company, at its office in Chicago, Illinois, the principal sum of four hundred and fifty dollars (\$450), with interest thereon from date until maturity, at the rate of seven per cent per annum, payable semi-annually, on the first day of May and November in each year, according to the tenor and effect hereof, and of the interest notes hereto belonging of even date herewith, and to the terms and conditions of the mortgage or trust deed securing the same. If any part of the principal or interest is not paid when due, it shall bear interest thereafter until paid, at the rate of ten per cent per annum, payable semi-annually, and if any interest remains unpaid ten days after it becomes due, or in case of failure to comply with any of the requirements of the mortgage or trust deed, given to secure the payment of this note, the principal and accrued interest shall, at the election of the holder hereof, become due and collectible, by suit or otherwise, forthwith, or at any time thereafter, without further notice, as fully as though made payable on demand.

Principal and interest are secured by a mortgage or trust deed duly recorded in Wheeler county, Nebraska, which is a first lien upon real estate appraised at \$1,200.

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It is expressly agreed and understood that this note and interest, with the mortgage or trust deed securing the same, shall be construed under the laws of the State of Nebraska.

PATRICK DWYER.
MARY E. DWYER."

"For value received, the Farmers Trust Company hereby assigns this note to —, or order, with recourse, as follows, viz.:

First. It guarantees the payment of the coupons attached hereto at the maturity thereof.

Second. It guarantees to collect, at its own expense, and to pay over the principal hereof at maturity, provided the same is paid by the maker.

Third. In the event of default being made by the maker it guarantees to collect, at its own expense, and to pay over the principal thereof, within two years from the maturity of the same, and to pay interest thereon at the rate of seven per cent per annum, payable semi-annually, until the principal is paid.

Provided, that if at any time the said Farmers Trust Company shall notify the legal holder of this note of its desire to repurchase the same by paying the amount due thereon, with accrued interest to date of repurchase, and any disbursements made for the collection of the same, the said holder shall, within thirty days thereafter, tender the said note with a proper assignment of the mortgage or trust deed securing the same to the said Farmers Trust Company, at its office in Chicago, Illinois, for sale upon the terms aforesaid. But in case the said holder shall elect not so to do after such offer of repurchase, then this contract shall terminate and said Farmers Trust Company shall be released from all former liability hereon. And provided further, that if this note shall be transferred, written notice of such transfer shall be given to said Farmers Trust Company within twenty days thereafter.

In witness whereof the said Farmers Trust Company has caused its corporate seal to be affixed hereto and these presents to be signed and delivered by its president this 2d day of July, A. D. 1889.

FARMERS TRUST COMPANY,
Per R. SAYER, Prest."

{ Farmers Trust Company
 Seal.
 Sioux City, Iowa. }

Nearly three years prior to the maturity of the note, appellee Shenuit became the owner thereof. He collected from appellant all semi-annual interest coupons from November 1, 1891, to May 1, 1894, inclusive. They were paid by appellant, and were still in its hands at the time of trial. Seven interest payments were made by appellant, the last November 10, 1894, six months after the maturity of the note. Subsequent payment of interest was refused by appellant, who refused also to pay the principal after the expiration of two years from maturity of the note.

This suit is brought specifically upon the third clause of the above guaranty.

KERR & BARR, attorneys for appellant, contended that an indorsement must be, as the word itself indicates, on the back of the note, and the legal title can not be transferred by a separate instrument in writing. Ryan v. May, 14 Ill. 49; Badgely v. Votrain, 68 Ill. 25; Barrett v. Hinckley, 124 Ill. 32; Packer v. Roberts, 140 Ill. 671.

CRATTY, JARVIS & CLEVELAND, attorneys for appellee.

Where an instrument sued upon is a complete contract in itself, conditions, provisos and matters of defeasance contained in a separate instrument, although executed contemporaneously, are matters of defense which the defendant must plead and prove. The note, assignment and guaranty make a complete contract in themselves, and if the mortgage contained any matter of defense, appellant should have pleaded and proved it. Chitty on Pleadings, Vol. 1, 223, 310; Byles on Bills, 101.

The note, although dated in Nebraska, being made payable in Illinois, is to be governed, as to the assignment and guaranty thereof, by the laws of Illinois. No proof of the laws of Nebraska was required of appellee. If appellant desired to rely upon any laws of Nebraska, he should have pleaded and proved the same like any other matter of defense. Chumasero v. Gilbert, 24 Ill. 293; Miller v. Wilson, 146 Ill. 523; Smith v. Whittaker, 23 Ill. 367; Bonnell v. Holt, 89 Ill. 71; Crouch v. Hall, 15 Ill. 263; Mason v.

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Dousay, 35 Ill. 424; Hyman v. Bayne, 83 Ill. 264; 1 Chitty on Pleadings, 216; 1 Robinson's Practice, 230; Roosa v. Crist, 17 Ill. 450; Lowy v. Andreas, 20 Ill. App. 521; Scudder v. Bank, 91 U. S. 406; Skelton v. Dustin, 92 Ill. 49; Abt v. Am. Tr. & Sav. Bank, 159 Ill. 467 and cases cited; Hakes v. Bank, 165 Ill. 275.

In the absence of any showing to the contrary, the law of Nebraska is presumed to be the same as that of Illinois. Chumasero v. Gilbert, 24 Ill. 293; Deem v. Crume, 46 Ill. 69; Smith v. Whittaker, 23 Ill. 367; Hall v. Kimball, 58 Ill. 58; 1 Daniel on Negotiable Paper, 4th Ed., 891; Byles on Bills, 7th Ed. (Sharswood), 408; Hakes v. Bank, 164 Ill. 275.

Where a question in a sister State is peculiarly a common law question, the presumption here is that the common law is in force in that State. Tinkler v. Cox, 68 Ill. 119; Wilson v. Miller, 42 Ill. App. 332; Crouch v. Hall, 15 Ill. 264; Lipe v. McClevy, 41 Ill. App. 59; Miller v. McVeagh, 40 Ill. App. 532; Van Ingen v. Brabrook, 27 Ill. App. 401; Belford v. Bangs, 15 Ill. App. 76.

A promissory note may be assigned by the payee writing his name upon the back of the note, or on its face, or on a paper attached, or in any manner upon the original paper or any attached paper wherever it may be most convenient, and so written as to show an intention to transfer the note. Herring v. Woodhull, 29 Ill. 96; Chitty on Bills, 227; Story on Promissory Notes, 121; 1 Daniel on Negotiable Instruments, 688; Byles on Bills, 7th Ed., 15; Crosby v. Roub, 16 Wis. 645.

The blank assignment need not be filed with appellee's name as assignee. Doing so would be mere matter of form. Fairbanks v. Campbell, 53 Ill. App. 216; McHenry v. Ridgley, 2 Scam. 309; Condon v. Bruse, 58 Ill. App. 251; MacPherson Bank v. Velde, 49 Ill. App. 21; Weston v. Myers, 33 Ill. 424.

A guaranty of a note operates also as an assignment of the legal title. A guaranty of a negotiable note passes with the assignment thereof, and inures to the benefit of any.

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subsequent taker. Webster v. Cobb, 17 Ill. 459; 1 Brandt on Suretyship, Sec. 47, and cases; Childs v. Davidson, 33 Ill. 438; Judson v. Gookwin, 37 Ill. 286.

MR. PRESIDING JUSTICE FREEMAN delivered the opinion of the court.

Appellant first contends that the note should not have been admitted in evidence, without production also of the mortgage.

It must be borne in mind that this suit is not against the maker of the note and mortgage, nor is it sought to recover under the terms and conditions of either. It is a suit upon the contract made subsequently. Whatever the terms and conditions of the mortgage may be, the appellant undertook, by its contract of guaranty, to collect at its own expense and pay over the principal of the note in the event of default.

If appellant desired the production of the mortgage upon the ground that it may have contained provisions contradicting the note as to time or place of payment, it could have obtained and offered it in defense upon proper notice. The note is complete in itself, and no such defense was set up by plea nor by offer of proof.

Appellant urges that as the note is by its terms to be construed under the laws of the State of Nebraska, it was necessary for the plaintiff to aver and prove that it was assignable under the laws of that State.

The assignability of a note is not a question of construction of the instrument itself, and we do not understand the provision referred to as applicable to the assignability or negotiability of the note. The note is by its terms made payable in this State. The contract was to be performed here, and it must be presumed that upon a question of this character the parties contracted with reference to the law of this State. Abt v. American Trust and Sav. Bank, 159 Ill. 467.

If by the laws of Nebraska the note was not assignable or negotiable, the appellant, if it desired to avail itself of such a defense, was bound to so plead and prove. When a

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foreign law is relied upon either for recovery or defense, the law must be pleaded and proved. *Chumasero v. Gilbert*, 24 Ill. 293.

It was not relied upon in this case for recovery, and it was not necessary to set it up in the declaration. If we assume, for the sake of the argument, that such may be the law of Nebraska, and that the defense would be available, then it was the duty of appellant to plead the statute relied upon. Where a party sues upon a note which he holds as an assignee under an assignment which, neither by the pleading nor the proof, is shown to have been made in a foreign State, we will not presume that it was so made, and that by the laws of such State the note is not negotiable or assignable merely because the note itself is by its terms to be construed according to the laws of such foreign State. Our courts will presume that the assignment was made in conformity to the law of the place of its execution, wherever that may have been, and will hold, in the absence of a plea and proof to the contrary, that the defendant admits the legality of the assignment. *Smith v. Whitaker*, 23 Ill. 367.

It is said that the assignment and guaranty attached to the note, and upon the same sheet of paper, are not sufficient to vest the legal title in the appellee. The contention is that as the guaranty is not on the back of the note, it is not an indorsement, and is therefore a separate instrument, and as such is not assignable.

The assignment and guaranty in this case are not upon a paper separate from the note. They are upon the same paper. Appellant, by such writing, "assigns this note to —or order," with the guarantees which follow. The intention to transfer the note by this assignment upon the note itself is perfectly clear and is unquestioned. It must be given effect according to such intent. In *Herring v. Woodhull*, 29 Ill. 92, the indorsement was on the face of the note. The court, by Justice Breese, says:

"Literally, indorsement, means a writing—indorse—upon the back of the bill or note. But it is well established that though such is its import, it may be made on the face of the bill, and numerous indorsements may be made on a separate

paper called an *allonge*. And any form is sufficient which manifests an intention to transfer the note." See cases cited.

In *Crosby v. Roub*, 16 Wis. 645, it was held that a bond written on a separate paper, but attached to the note, was fully sufficient to pass the legal title within the law merchant; and that there is not any inflexible rule of the mercantile law requiring the indorsement to be on the identical paper on which the note was originally written.

In the case before us, however, the appellant transferred the note by an assignment and guaranty of collection and payment upon the identical paper containing the note, and there can be no room for doubt that thereby the title passed to the legal holder. The statute provides that such note "shall be assignable by indorsement thereon, so as absolutely to transfer and vest the property thereof in each and every assignee successively." Rev. Stat., Chap. 98, Sec. 4. We regard the statute as substantially complied with by this indorsement, and hold that it is not a separate instrument.

The indorsement is, so far as the name of the payee is concerned, in blank. The legal effect, therefore, was "to make the note payable to the person to whom it is delivered, and any subsequent holder." *Fairbanks v. Campbell*, 53 Ill. App. 219.

It is said in *Webster v. Cobb*, 17 Ill. 549 :

"The guaranty is general, specifying no person to whom the guarantor undertakes to be liable, and is upon the back of a negotiable instrument. In such case the guaranty runs with the instrument on which it is written and to which it refers, partakes of its quality of negotiability, and any person having the legal interest in the principal instrument, takes in like manner the incident, and may sue upon the guaranty. This view is consistent with the nature of the transaction, the evident intention of the parties, and the objects and uses of commercial paper."

To the same effect is *Ellsworth v. Harmon*, 101 Ill. 274.

It is urged that the note was improperly admitted in evidence, because appellant did not show written notice to appellee within twenty days after the transfer to him, and that hence he can not maintain suit on the guaranty in his

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own name. The evidence tends to show that appellee received the note from a banking house of one Haerther, but whether the latter received the note from appellant originally, or in what capacity, whether as purchaser for value or as agent of appellant to dispose of it, does not appear. For aught that appears, appellee may have received the paper direct from appellant through its agent.

The interest coupons, however, were presented to appellant, some of them, at least, by appellee in person, and the secretary of appellant testifies that the company did have notice of appellee's claim to the paper. The latter testifies that appellant paid interest to him "seven times, beginning in 1891." The payment of these interest coupons was specially guaranteed in the first clause of the guaranty. Having actual notice of appellee's interest, and complying with the terms of the guaranty by paying the coupons during all that time without objection, appellant must be held to have waived any right to now object upon the sole ground that such notice was not in writing, nor given within twenty days.

The objection that appellee did not deliver the note to appellant for collection, is not, we think, well taken. Appellant guaranteed to collect at its own expense. If it had undertaken in good faith to do so, and appellee had then interposed unnecessary obstacles, or prevented collection by withholding the note and mortgage, a different case would have been presented.

Other objections are urged, but we find no error in the judgment of the Circuit Court, and it will be affirmed.

**Lucius B. Mantonya, Impleaded, etc., v. George Reilly
and The Powers Duplex Regulator Co.**

1. **MECHANIC'S LIEN—Sub-Contractor's Contract, Act of 1874.**—Sections 29 and 45 of the Mechanic's Lien Law of 1874 are parts of the same act and relate to the same subject-matter, namely, the liens of sub-contractors, and must be read and construed together.

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2. SAME—*Where the Principal Contractor Abandons his Contract.*—Under the act of 1874, sub-contractors are entitled to liens when the principal contractor abandons his contract, and such liens are to be limited to the original contract price, less payments rightfully made by the owner.

3. SAME—*Where the Original Contract Price Has Been Fraudulently Fixed Unreasonably Low.*—Where the contract price has been fraudulently fixed unreasonably low by the owner and contractor for the purpose of defrauding sub-contractors, then the difference between the contract price so fixed and a fair price for the labor and material, when ascertained, is to be regarded as the actual contract price.

4. ESTOPPEL—*To Claim a Contract Different from the Details.*—Where the detail drawings furnished to a contractor from which to make an estimate for the purpose of bidding on the work do not show the parts of the work in question, the person furnishing such drawings is estopped to claim that the contract included such parts.

5. EVIDENCE—*Of Witnesses Swearing Falsely.*—When a witness willfully swears falsely in relation to a material fact, a jury is not, from that circumstance alone, warranted in wholly disregarding his testimony. It is the uncorroborated testimony of the witness that may be disregarded.

6. PRESUMPTIONS—*Failing to Produce Evidence.*—The mere withholding or failing to produce evidence, which, under the circumstances, a party is expected to produce, and which is available, gives rise to a presumption against such party.

7. PARTIES—*Objection for Want of, Must be Made in the Court Below.*—Where no objection for want of parties was made either before the master or the court, it can not be made in the Appellate Court for the first time.

8. SALES—*Under Decree for Liens.*—Where a building is erected on one lot and the adjoining ten feet of another, and under one roof, it is properly decreed to be sold as a whole.

9. NOTICE—*Of Liens Necessary.*—Where a notice of lien is not served on a party, his interest in the premises is not chargeable with the lien.

Petition, for a mechanic's lien. Trial in the Circuit Court of Cook County; the Hon. MURRAY F. TULEY, Judge, presiding. Decree for petitioner; appeal by defendants. Heard in this court at the October term, 1898. Affirmed. Opinion filed June 12, 1899.

RICH & LOEHR, attorneys for appellant.

ALBERT N. EASTMAN, attorney for George Reilly, appellee.

MR. JUSTICE ADAMS delivered the opinion of the court.
George Reilly, appellee, filed a petition for a mechanic's

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lien as sub-contractor, and the Powers Duplex Regulator Company became a party defendant to the petition, and filed, as an original contractor, a cross-petition for a lien. There were other parties defendant to Reilly's petition who filed cross-petitions claiming liens, but their claims were disallowed, so that the sole contest here is between the appellees named and appellant. The court decreed that Reilly and the Powers company were entitled to liens, the former for \$2,272.59 and the latter for \$237.09.

Appellant and his wife were the owners, each of one undivided half, of the premises. May 24, 1893, appellant and John W. Hersey entered into a contract, evidenced by writing of that date, by which Hersey agreed, for the consideration of \$31,000, to furnish all the labor and material for the construction of a four-story and basement stone and brick apartment building at numbers 374, 376 and 378 Dearborn avenue, Chicago, Illinois, excepting steam heating, mantels, gas fixtures and electric work, in accordance with drawings and specifications furnished by John J. Kouhn, architect, in a good, workmanlike and substantial manner, to the satisfaction of the owner, and under the directions of said architect and the owner, "to be testified by a writing under hand." The agreement provided, among other things, that Hersey was to be paid from time to time as the work should progress, to the approval of the owner or any one whom he might select, by certificates from the architect, not to exceed seventy-five per cent of the amount of material or labor employed. The said architect was made the arbiter of any disputes which might arise between the parties, his decision to be final and binding on the parties. Delay caused by either party was to be compensated to the other party at the rate of \$25 per day. The contract contained this provision :

"Plans and specifications are a part of this contract; anything on plans and not on specifications, or *vice versa*, shall be considered a part of this contract."

The contract also contained the following:

"The work shall be done in accordance with working drawings furnished by architect whenever required."

November 10, 1893, appellee Reilly filed his petition, setting up the above mentioned contract between Mantonya and Hersey, alleging that Hersey entered upon the work and continued the same until August 25, 1893, when he abandoned it; that petitioner is informed and believes that Hersey performed the greater part of the work, and that Mantonya, at the time of abandonment, was indebted to him in the sum of \$9,000; that Kouhn, the architect, had issued to Hersey a certificate to the extent of \$9,000, which Mantonya refused to pay; that petitioner, June 3, 1893, contracted with Hersey to do the cut-stone work on the building, setting out the contract in full; that petitioner continued to work under his said contract till August 23, 1893, at which date he had substantially performed the same; that Hersey refused to pay him the money due him, and he refused to proceed; that then Mantonya, to induce petitioner to proceed with the work, told him that he, Mantonya, was indebted to Hersey in an amount exceeding the contract price in petitioner's contract with Hersey, and that if petitioner would proceed with the work, he, Mantonya, would retain from the money which he owed Hersey enough to pay petitioner in accordance with his contract, and petitioner, relying on such assurance, continued and performed his contract. It is then averred that neither Hersey nor Mantonya, though frequently requested so to do, have paid petitioner; that there is due petitioner \$2,000, and that he served appellant with notice of lien. The petition makes appellant and others parties, and concludes with the usual prayer, and for general relief. January 16, 1894, Reilly filed an amendment to his petition alleging, as an excuse for not serving Mantonya with a copy of his contract with Hersey, that there was only one copy, which was in the possession of Kouhn, who, at Mantonya's instigation, refused petitioner access to it. May 6, 1896, a second amendment to Reilly's petition was filed, which amendment is as follows:

"After the setting forth of the contract by and between Mantonya and the said Hersey, and immediately after the same, insert as follows: Your petitioner further shows

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unto your honors, that the said contract, as aforesaid, made and entered into by and between the said Hersey and the said Mantonya, though executed in person and in the name of said Lucius B. Mantonya, was so executed for and on behalf of himself and his wife, Ella W. Mantonya, and in their joint interests, and as a contract for both, and with her knowledge, consent and approval, for their joint interests and benefit. And your petitioner further shows unto your honors that he is informed and believes that, though the consideration of the said contract, specified therein, is \$31,000, yet the true and real consideration for the doing of said work was a large sum in excess of that, to wit, \$10,000 more, to wit, the sum of \$41,000; and that, in the entering into and making of said contract, the said Hersey and Mantonya conspired and confederated together, and pretended to contract for a much smaller sum than was really agreed to be paid for the work and labor so to be performed, for the purpose of preventing the creditors of the said Hersey from obtaining the benefits of said contract, and of defrauding and cheating them out of such sums of money as might be justly due and owing from the said Hersey to them for labor and material thereafter performed on the said building of the said Mantonya, in pursuance of the said undertaking between him and the said Hersey," etc.

August 9, 1895, the issues having been made up by proper pleadings, the cause was referred to George Mills Rogers, master in chancery, to take and report proofs, with his conclusions thereon. The master's report was filed December 20, 1897. Fifty objections were filed by appellant to the report before the master, all of which he overruled. These objections, with the exception of ten of them, which were waived by appellant in the Circuit Court, stood as exceptions in said court, and were overruled by the court and the master's report confirmed.

The contracts between Mantonya and Hersey and between Hersey and Reilly having been made in 1893, the law then in force, namely, the act of 1874, entitled, "An act in relation to liens," as amended, must control as to the rights of the parties. Hurd's Rev. Stat. 1893, p. 930; Andrews & Johnson Co. v. Atwood, 167 Ill. 249; Springer v. Bowerman, 75 Ill. App. 352.

Appellant's counsel insist that in case of the abandonment

of the work by the chief contractor, the remedy of a subcontractor is exclusively under section 45 of the act, and can not be under section 29, as was held by the master and the court.

Sections 29 and 45 of the act are as follows:

"Sec. 29. Every sub-contractor, mechanic, workman, or other person who shall hereafter, in pursuance of the purposes or the original contract between the owner of any lot or piece of ground, or his agent and the original contractor, perform any labor or furnish any materials in building, altering, repairing, beautifying or ornamenting any house or other building or appurtenance thereto, on such lot or on any street or alley and connected with such building or appurtenance, shall have a lien for the value of such labor and materials upon such house or building and appurtenances, and upon the lot or land upon which the same stands, to the extent of the right, title and interest of such owner at the time of making the original contract for such house or the improvement, but the aggregate of all the liens hereby authorized shall not exceed the price stipulated in the original contract between such owner and the original contractor for such improvements. In no case shall the owner be compelled to pay a greater sum for or on account of such house, building or other improvements than the price or sum stipulated in said original contract or agreement, unless payments be made to the original contractor, or to his order in violation of the rights and interests of the persons intended to be benefited by section 35 of this act: Provided, if it shall appear to the court that the owner and contractor fraudulently, and for the purpose of defrauding sub-contractors, fixes an unreasonably low price in their original contract for the erection or repairing of such building, then the court shall ascertain how much of a difference exists between a fair price for the labor and material used in said building or other improvements and the sum named in said original contract. Said difference shall be considered a part of the contract, and be subject to a lien, but in no case shall the original contractor's time or profits be secured by this lien only so far as the sum named in the original contract or agreement."

"Sec. 45. Should the original contractor, for any cause, fail to complete his contract, any person entitled to a lien as aforesaid may file his petition in any court of record, against the owner and contractor, setting forth the nature of his claim, the amount due, as near as may be, and the names of

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the parties employed on such house or other improvement subject to liens; and notice of such suit shall be served on the persons therein named; and such as shall appear shall have their claims adjudicated, and decree shall be entered against the owner and original contractor for so much as the work and materials shall be shown to be reasonably worth according to the original contract price, first deducting so much as shall have been rightfully paid on said original contract by the owner, and damages, if any, that may be found to be occasioned by the other reason of the non-fulfillment of the original contract; the balance to be divided between such claimants in proportion to their respective interests, to be ascertained by the court. The premises may be sold as in other cases under this act."

We can not agree with the view of appellant's counsel. Section 45 evidently relates to cases in which the contract price has been fairly and without fraud fixed by the parties, and the proviso in section 29 to cases in which the contract price has been fraudulently fixed by the owner and contractor and unreasonably low, for the purpose of defrauding sub-contractors.

The two sections are parts of the same act, relate to the same subject-matter, namely, the liens of sub-contractors, and must be read and construed together. So reading and construing them, sub-contractors are entitled to liens, when the principal contractor abandons his contract, such liens to be limited to the original contract price, less payments rightfully made on the original contract by the owner, but in case the original contract price has been fraudulently fixed unreasonably low by the owner and original contractor, for the purpose of defrauding sub-contractors, then the difference between the contract price so fixed and a fair price for the labor and material, when ascertained, is to be regarded as a part of the contract price, or, in other words, such fair price, when ascertained, is to be regarded as the contract price. That appellees have taken the necessary steps to perfect their liens, on the hypothesis that they would be entitled to liens in any event, is not contested.

July 23, 1893, appellee Reilly and Hersey executed a contract in writing, by which Reilly agreed to furnish the labor

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and material for the cut stone work, in accordance with the drawings and specifications, for the consideration of \$3,000. By the contract, Reilly was to be paid on certificates of the architect, the certificates, while the work was progressing, not to exceed seventy-five per cent of the value of material and labor. No certificates have ever been issued to him, and he has received on his contract only \$1,000, which was paid to him by Hersey. The objections urged in argument to the claim of appellee Reilly, in so far as they relate to the performance of his contract, and the amount found to be due to him by the master, are that he omitted to furnish quoins, and that the master, in stating his account, did not charge him with their value; that he also omitted tuck pointing and the curbing along the lot line, and that the master, in stating his account, did not charge him enough for these omissions. Rosenstock, the architect who drew the plans and specifications, and superintended the completion of the work after its abandonment by Hersey, testified, as did also Hersey, that the detail or working drawings did not show quoins. Hersey, who contracted with Reilly, further testified that Reilly figured from the detail drawings. The detail drawings having been furnished to Reilly from which to make an estimate, for the purpose of bidding on the work, and the drawings not showing quoins, appellant is estopped to claim that Reilly's contract included quoins. *Sexton v. City of Chicago*, 107 Ill. 323.

Mantonya testified that the tuck pointing cost \$169, and that the bill for the flagging or fence coping, meaning the curbing, was \$79.55. There was no attempt made to prove that those were reasonable prices. Rosenstock, appellant's architect, testified that the value of the curbing was \$67.50, and that the tuck pointing was reasonably worth \$75. These figures were adopted by the master, properly, as we think, and the amounts were charged against Reilly in the statement of his account. The master, after deducting from Reilly's contract price the amount paid him up to August 15, 1893, namely, \$1,000, the amount charged him for omission of tuck pointing, \$75, and

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the amount charged him for omission of curbing, \$67.50, credited him with interest on the remainder from August 23, 1893, the date of Reilly's lien notice served on Mantonya, and about the date when Reilly quit work. The court, in its decree, allowed Reilly interest on the balance found due to him by the master from August 20, 1893, to the date of the decree. We find no error in this regard. The evidence was ample to warrant the master in finding that Reilly, with the small exceptions noted, performed his contract. Reilly testified that after he quit work he had a conversation with Kouhn, the architect, who had been discharged by Mantonya about August 17, 1893, and that Kouhn told him his work was first-class, that he found no objection to it, and that he would issue a certificate to him for his money, but that he had been discharged by the owner. Kouhn, called by Mantonya, testifying in relation to Reilly's work, made no objection to the work, except to mention the omissions of tuck pointing and curbing. Hersey testified that, August 23, 1893, Reilly's work was entirely completed, with the exception of tuck pointing, which could not be done till after the building was ready for it. The master finds, and the evidence shows, that when Reilly quit work, because he could not get either certificates or money on his contract, the building had not so far progressed that the tuck pointing could be done, and that he was never requested to do it. The master finds: "Hersey is manifestly not to be relied on, for he contradicts himself and is contradicted by others and by documentary proof to such an extent that his testimony is of no value, except as indicating his own character." If this is to be understood as meaning that Hersey's testimony is to be wholly disregarded in considering the cause, we can not agree with the master. Even when a witness willfully swears falsely in relation to a material fact, a jury is not, from that mere circumstance, warranted in wholly disregarding his testimony, and an instruction to that effect would be erroneous. In such case only the uncorroborated testimony of the witness may be disregarded. His corrob-

orated testimony may be considered. These remarks are made because Hersey's testimony has been largely commented on by counsel, and is necessary to be referred to in this opinion.

This occurs in the master's report: "In my opinion, and I so find, there were at least two contracts and possibly three drawn up, and the \$31,000 contract was intended to be used to defraud the sub-contractors, one of the others being the contract under which the work was done." Considering the whole report, it is, in substance, that the owner and original contractor fraudulently fixed the price, \$31,000, unreasonably low, for the purpose of defrauding sub-contractors. That \$31,000 was an unreasonably low price for the work contracted to be done by Hersey is, we think, clearly shown by a preponderance of the evidence. Rosenstock was the first architect employed by Mantonya, and, after he had prepared the plans and specifications for the building, he advertised for bids and received bids varying from \$40,000, the lowest, to \$42,000, the highest. The bids were submitted to appellant, who does not differ much from Rosenstock as to the amount of the lowest bid. Appellant says the lowest was \$39,000. Hersey abandoned the work August 21, 1893. At that date he had been paid on architect's certificates \$15,000. On the hypothesis that certificates were issued for only seventy-five per cent of the value of the labor done and materials furnished, as provided by the contract, the estimate of the architect of the value of such labor and material, when he issued the last certificate, which, with those previously issued, amounted to \$15,000, must have been \$20,000, \$15,000 being seventy-five per cent of that sum. The provision in the contract is: "The contractor shall be paid from time to time, as the work progresses to the approval of the owner or any one he may select, by certificates from the architect, not to exceed seventy-five per cent of the amount of material and labor employed." It is a legitimate conclusion that the architect, in issuing certificates for \$15,000, estimated the value of the labor and material furnished by Hersey at \$20,000,

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and that appellant, who, as appears from the record, was certainly the reverse of negligent in guarding his own interests, by paying the certificates, approved the architect's estimate. It can not be presumed that the architect, in issuing the certificates, violated his duty, or that appellant, in paying them, neglected his interest. That the estimate, \$20,000, was substantially correct, is shown by the testimony of other witnesses. The following named witnesses estimated the value of the labor and material in the building, when Hersey abandoned the contract, as follows: Samuel Pigott, who completed the carpenter work by contract with appellant, \$15,000; John M. Bergstrom, \$15,000 or \$15,500; G. W. Straub, \$16,696; Jules De Horvath, architect, \$16,413.60; Richard Rosenstock, \$19,250; John M. Dumphy, \$22,323.35. Mantonya testified that about September 1, 1893, Rosenstock examined the building and made an estimate of the value of the labor and material in it, by items, which he, Mantonya, took down in a book, and which amounted in all to \$14,800. Charles Suhr, appellant's employe, corroborates appellant. Rosenstock testified that he never made an estimate of the value of the labor and material at \$14,800. The master adopted Rosenstock's estimate, \$19,250, and, as we think, reasonably. As heretofore stated, Rosenstock was first employed as the architect of the building, and prepared the plans and specifications, but owing to some disagreement between him and appellant, appellant discharged him and employed Kouhn. Subsequently, about August 17, 1893, appellant, not being able to agree with Kouhn, discharged him, and about September 1, 1893, again employed Rosenstock to supervise the completion of the building, in accordance with the plans and specifications, which he, Rosenstock, had previously prepared. Rosenstock, having prepared the plans and specifications and having been employed to superintend the completion of the building in accordance with them, and it being his duty to advertise for bids for that purpose, his attention was necessarily called to the labor and material already performed and furnished, and his estimate, therefore, is as

reliable as that of any other witness, if not more so. It cost Mantonya \$23,776.06 to complete the work contracted to be done by Hersey, which, added to \$15,000 paid to Hersey on architect's certificates, made the total cost of the building to appellant \$38,776.06.

Evidence was produced on behalf of appellant, for the purpose of proving that the work contracted for by Hersey could have been done for \$31,000. Samuel Pigott having stated that he was familiar with the value of labor and material from May till September, 1893, both months inclusive, this occurred :

Q. " You may state, if you will, whether the building could have been constructed at that time, exclusive of the steam heating, the electric wiring and grille work, for \$31,000 ? " A. " It might have been. There is nothing impossible."

The question did not direct the witness' attention to any particular month, and what month he had reference to by his answer is not apparent. He testified, however, that before Hersey's contract was made, he bid \$15,130 for doing the carpenter and joiner work. He had testified that the value of the carpenter work done by Hersey was \$2,950, and also that his bid for completing the carpenter work was \$9,200, which would make the total value \$12,150; and on being asked to explain the inconsistency of these figures with his original bid of \$15,130, he said that when he first bid labor and material were higher than when he bid in September, 1893. In Bergstrom's examination, this occurred :

Q. " Well, could the mason work, the carpenter work, the cast-iron work, the roof, galvanized cornice, the plumbing, the plastering and painting, as provided in these plans and specifications, have been done in the summer of 1893 for the sum of \$31,000 ? " A. " Well, it is only my guess, but I think it could have been done, but I don't think anybody would get rich at it," etc.

Horvath, architect, testified that the work could have been done in the summer of 1893 for \$31,610. It does not appear from the evidence of this witness that he examined the building. He merely computed the number of cubic feet in the building from data obtained from the plans and

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specifications, and multiplied it by seven and one-half, assuming from what he says was his experience in the construction of similar buildings in the summer of 1893, that such work would cost about seven and one-half cents per cubic foot of area. Kouhn, having stated that he was familiar with the value of labor and material in the summer of 1893, was asked :

"I will ask you whether, in your opinion, \$31,000 is a reasonable price for the work on the Mantonya flat building that was specified in Hersey's contract, at that time?" A. "I think there was no fortune in it, but a man could carry it through. At that time prices were very low, just in the midst of a panic, if I remember right."

The witness does not answer whether the price stated was, or not, reasonable. His answer rather indicates that, in his opinion, it was not.

It is obvious that the true question is not what the building might have been constructed for in the summer of 1893, but what the fair value of labor and material was at the time the contract price of \$31,000 was fixed. The master found that in September, 1893, when the contracts were made by appellant to complete the work comprised in the Hersey contract, the value of labor and material was twenty per cent less than at the time the Hersey contract was made, and therefore, in estimating what was a fair price for the work when the Hersey contract was made, the amount paid by Mantonya for the completion of the work should be increased twenty per cent.

John M. Dumphy, building contractor, testified that building material was from twenty to twenty-five per cent lower in the fall than in the spring of 1893.

Jules de Horvath, architect and witness for appellant, testified that in March or April, before the opening of the World's Fair, building material and labor were considerably higher than in September, 1893; that in March and April one had to pay seven dollars per day for a plasterer, the ordinary wages being four dollars per day.

C. W. Straub, an estimator and builder, called by appellant, testified:

Q. "How about the value of material in March as compared with September?" A. "There was a considerable difference."

Q. "In what way?" A. "It was less in August. It was less after the World's Fair was practically completed. That is the time of the slump in prices."

It is plain from the evidence of this witness that the slump in prices did not occur until after the date of the Hersey contract. Bergstrom, appellant's witness, testified that labor and material were worth less in September, 1893, than in the preceding March of that year, but that a difference of twenty per cent would be pretty high; he did not, however, deny that there was that difference. We can not say that the master was not warranted by the evidence in finding that the value of labor and material was twenty per cent lower in the fall of 1893, than in May, 1893, when the contract between appellant and Hersey was made.

The next question is, whether the price of \$31,000 was fraudulently fixed, for the purpose of defrauding the sub-contractors. Mantonya testified that he advertised for bids for the work at the same time that Rosenstock, his architect, advertised. Rosenstock, examined November 14, 1895, testified that, after he had received bids, he went to appellant's store, and that appellant showed him a bid of \$31,000, which was in the form of a letter, the heading and signature of which were turned down, so that he, witness, could not see the name of the bidder, and that he did not know who the bidder was; that he told appellant that the work could not be done for \$31,000; that it was an impossibility, and that if he accepted the bid he would have to take the chances, knowing it was an under bid, and that appellant said he didn't care if it was, that the party was responsible, that he was not running the contractor's business. The witness further testified that on a subsequent occasion appellant told him that he didn't care whether he paid the sub-contractors or not; that he would pay the contractor.

The same witness, examined November 22, 1895, testified that, about three weeks before the last date, appellant came to his (witness') office, and said to him that he wanted to

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show him the testimony in the case, as far as it had progressed, so that he could get some pointers from witness; that, in the conversation which ensued, he asked appellant if it was not a fact that more than one contract was in existence, and that appellant said yes, there were three, one for \$41,000, one for \$55,000, and the original contract. By the original contract, witness says he knew appellant meant the \$31,000 contract. The witness having testified that, so far as he knew, the work was done under the \$41,000 contract, the examination proceeded as follows:

Q. "You don't know, though, in relation to that, only as hearsay?" A. "No, sir, I do not by hearsay, it was here admitted by Mr. Mantonya." Q. "When?" A. "Oh, some time ago." Q. "Where?" A. "Right in his own office." Q. "What did he say about it?" A. "I said, 'Isn't it a fact, Mr. Mantonya, that you are working under a different contract than the \$31,000 contract?'" He said, "Yes." Q. "When did he say that?" A. "Oh, that was while the building was being finished, when we were re-letting it." Q. "When it was being finished?" A. "I made the remark, 'That comes pretty close to my figure then, doesn't it?'" Q. "What was said then?" A. "He said yes."

The circumstances of Rosenstock's employment to supervise the completion of the building after Hersey's abandonment of the work, were not such as to induce him to favor sub-contractors. Rosenstock wrote to appellant the following letter, which appellant received:

"September 8, 1893.

L. B. MANTONYA, Esqr.,

DEAR SIR: Concurrent to our conversations relative to assuming control of your building known as 374, 376 and 378 Dearborn Ave., my fees therefor shall be as follows: that is, if buildings are completed, and defeating the claims of sub-contractors who have furnished materials and labor previous to the first day of September, without suit at law, you are to pay me \$1,000. If only one-half are defeated you are to pay me \$750, and if all of such contractors are allowed and paid, you are to pay me \$500. All of such payments are to be for my services in superintending the construction and finishing of said buildings; the sum of \$250 is to be paid when the

buildings are plastered, and the balance, if any, of above said amounts to be paid on the completion and settlement of all claims which may be against said buildings on any of the above bases.

No contracts to be let outside of my office or any settlement made without my consent. Please send me acceptance of this by bearer, and oblige.

Very truly yours,

R. ROSENSTOCK."

Rosenstock testified that he would not say positively that Mantonya ever accepted the above proposition, and Mantonya testified that he never took any notice of it, but there is no evidence of any other proposition having been made by Rosenstock, and Mantonya, after receiving the proposition, employed Rosenstock to superintend the construction of the building. The letter too, contains internal evidence that in the conversations which had occurred between Rosenstock and appellant, the terms of Rosenstock's employment had been agreed on, and appellant had requested him to commit them to writing in the form of a proposition. It is inconceivable that any architect, of his own motion, and without prior agreement, would have made such a proposition. The proposition having been accepted by the employment of Rosenstock, he was interested to the extent of \$500 in defeating the claims of all sub-contractors who had furnished labor or material prior to September 1, 1893.

The terms of Rosenstock's re-employment are also evidence of appellant's intention in regard to sub-contractors.

July 27, 1896, six months after Rosenstock had positively testified that appellant had told him there were three contracts and that the work was done under the \$41,000 contract, he was called as a witness by appellant, in rebuttal.

The first question and answer in his examination are as follows:

Q. "Mr. Rosenstock, you stated here, on November 22, 1895, that you had a conversation with Mr. Mantonya, wherein you said that you asked him if it was not a fact that there was more than one contract in existence, and that Mr. Mantonya told you, yes, there were three, one for

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\$41,000, one for \$55,000 and the original contract. Do you now swear that, in that conversation with Mr. Mantonya he told you there were three contracts, or mentioned any figures?" A. "You are getting me back here eight months and then want me to swear to that—ten months."

Here his answer was interrupted by counsel, who pressed the question and the witness answered, "I won't swear positively." Then he is examined in regard to possible conversations between him and Hersey in relation to the contracts and the examination proceeds thus:

Q. "Isn't it a fact that in your previous testimony you confused the conversations you had with Hersey about the three contracts with the one you testified you had with Mantonya?" A. "As I said before, I won't swear to that, no." Q. "Isn't it a fact that you did confuse, or may have confused your conversations with Hersey?" A. "I won't be positive either way; it may be and may not. It might be possible; talking things over all around, things got jumbled." Q. "As a matter of fact, did Mr. Mantonya ever claim or admit to you, that he was working under a \$41,000 contract with Mr. Hersey, or under any contract other than \$31,000?" A. "You are taking me back considerable." Question read. A. "He always claimed he was working under that \$31,000 contract."

In view of the manifest hesitations and evasions of the witness, of which the answers last quoted are an example, the foregoing evidence is not worthy of serious consideration. On cross-examination, the witness being asked to explain his apparent doubts now, in view of his previous positive testimony, said:

"Some time ago, I can't tell you the exact date, I had Mr. Mantonya before a justice of the peace, wherein Mr. Hersey positively swore that he was working under a \$41,000 contract, and later on I found it was nothing of the kind."

How this is explanatory of the former testimony of the witness as to what Mantonya said is not apparent. The witness further testified that, since the case had been going on, he had caused Mantonya to be arrested, and that the prosecution had been dropped, and also that Mantonya had been in witness' office repeatedly during the month next preceding his last examination.

The cross-examination of Rosenstock concluded as follows:

Q. "Are you willing to swear positively, at this time, that Mr. Mantonya did not say to you what you previously testified to?" A. "I answered that question before." Q. "Well, let us have it again." A. "I said no." Q. "He never said it to you?" A. "I said I am not willing to swear." Q. "That he did not?" A. "That he did not."

In calling this witness, appellant utterly failed in his purpose. He was called to have him, if possible, retract his previous testimony, which he positively and repeatedly declined to do. It is useless to speculate on what influences may have been brought to bear on him to induce him to cast doubt on his previous testimony, but that some influence was used for that purpose is, we think, apparent.

Hersey testified that there were three contracts, one for \$31,000, one for \$41,000 and one for \$55,000; that he signed the former two, but not the \$55,000 one; that one of the contracts was to skin the lender of money; one, the \$31,000 one, to skin Rosenstock; that all the certificates which were paid were issued on the \$41,000 contract, and that the certificates and Kouhn's, the architect's, stubs, would so show. He says, "I am sorry I was a party to it, but I happened to get in the trap."

Appellant put in evidence a bill for mechanic's lien, filed by Hersey against appellant to the October term, 1895, of the Superior Court of Cook County, in which the \$31,000 contract was set up and relied on. The bill was signed and sworn to by Hersey. The matter of that bill was, subsequently, settled by the parties. This evidence tended strongly to weaken Hersey's testimony that the work was done under a \$41,000 contract. He explains it by saying that at the time of filing the bill he had not in his possession the \$41,000 contract; that either Mantonya or Kouhn, the architect, had it; that he so told Runyan, his solicitor, and that Runyan told him that he would have to file a bill on the contract which he had in his possession, and prove the existence of the other. This statement was not contradicted by evidence.

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Appellant was notified to produce the certificates. He produced three, one for \$2,000, which was the last paid, and which, with prior certificates, made up the \$15,000 paid to Hersey; one for \$3,000, dated August 12, 1893, and one for \$6,600, dated August 25, 1893. The last two certificates were not paid, appellant claiming that they were wrongfully issued by Kouhn. The \$2,000 certificate was the only one of the certificates on which payments to the amount of \$15,000 were made, which was produced by appellant. He testified that he did not know where the others were. The original certificates produced are not before us, but only copies of them. The master, who saw the originals, found that where the figures 12 are, indicating the date of the \$3,000 certificate, there had been an erasure and the figure 2 had been written over what was erased; that the contract price was not stated in any of the certificates; that in the \$2,000 certificate, opposite the words "contract price," where the figures would be, and opposite the words "balance due," where the figures would be, there were erasures, and that the omissions of the contract price and the erasures tended to create suspicion of the honesty of purpose of the architect, or Mantonya, or Hersey, or perhaps all three of them. The non-production of the other certificates which appellant paid, and which he must have had in his possession, is not a favorable circumstance for him. He testified that all certificates paid were paid in currency, so that he had no returned checks as evidence of payments, and that he kept no book accounts of payments made on certificates. The certificates, then, were the only documentary evidence of payments, and it was clearly his interest to preserve them, and it is apparent from the record that he was vigilant in guarding his interests. Not satisfied with Rosenstock advertising for bids, he advertised, at the same time, himself. He discharged Rosenstock because he could not agree with him about the work, and employed Kouhn. He discharged Kouhn on account of disagreement with him, and re-employed Rosenstock. He testifies that before he re-employed Rosenstock, and when

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the question was being discussed of the value of the labor and material in the building, he was careful to take down in a book, which he had with him before the master, items of value stated verbally by Rosenstock, and, when called on to prove the cost of the completion of the building, he produced twenty-two architect's certificates and vouchers, which he had carefully preserved, as evidence of such cost. The evidence fails to show that he made any search for the certificates on which he paid Hersey. The mere withholding or failing to produce evidence, which, under the circumstances, would be expected to be produced, and which is available, gives rise to a presumption against a party. 1 Jones on Ev., Sec. 17, and cases cited in n. 1; Rector v. Rector, 3 Gilm. 105, 119-20.

George Reilly, appellee, examined September 23, 1896, testified that July 22, 1896, Kouhn, the architect, exhibited to him a book containing stubs of certificates issued to Hersey. Objections being sustained to evidence of the contents of the stubs, Kouhn, who was present and who had been subpoenaed to produce the stubs and a postal card mentioned by Reilly, was called, and testified that he had given the postal card to Mantonya, and that he could not find the other documents; that he had moved three or four times, and had searched for, but could not find them. Reilly was then permitted to proceed, and testified that by two of the stubs the contract price purported to be \$47,000, and by a third \$49,000; that on one stub issued on a \$47,500 contract, there was: amount issued, \$10,000; balance, \$37,500. On another so purporting, was: contract price, \$47,500; total amount issued, \$20,000; balance, \$27,500; and that on the stub on which the contract price purported to be \$49,000, the amount of the certificate was \$3,000. He also testified that the stubs showed the number of the building on which the certificates were issued, and the dates of the certificates, but he could not recollect the dates. He said Kouhn turned over the stubs in the book and showed him the stubs he described. He also testified that Kouhn offered the stub book to him for \$10, but he refused the offer.

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Kouhn was the next witness after appellee Reilly on the same day. He was called by appellant and testified that he saw the May 24th, or \$31,000, contract signed, and that he issued no certificates on any other contract, or purporting to be on any other contract, but was not asked a single question as to whether there were such stubs in his stub-book as Reilly had testified he showed him, or whether he showed Reilly any stubs. In view of the fact that he was present when Reilly testified, and was called immediately after Reilly's examination, this omission could not have been an oversight, and is significant.

About the middle of August, 1893, Reilly stopped work because he could get no money from either Mantonya or Hersey, and threatened not to proceed with the work unless he was paid. He and Hersey both testified that Mantonya, to induce Reilly to proceed with the work, promised him that if he would proceed, he, Mantonya, would see that he was paid, and that if Hersey would not pay him he would, and that thereupon Reilly proceeded with the work and completed it, with the exceptions heretofore stated.

In regard to Mantonya's testimony, it is sufficient to say, as does the master, in substance, in his report, that he denied everything, whether material or immaterial. The appellant claimed that, in stating the account, the master should have allowed him damages for delay in the completion of the work, but the master disallowed this claim, holding that the questionable relations existing between appellant and Hersey probably resulted in the abandonment of the work by the latter, and was brought on by appellant's fault. It having been proved, however, that it probably cost appellant from \$2,500 to \$3,000 more to complete the work, by reason of having to employ another contractor (who would figure higher on account of things which he could not see) than if it had been completed by the original contractor, \$2,500 was allowed to appellant in the statement of the account.

The objection is made that the Artesian Stone and Lime Works Company was not made a party to the proceedings.

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Appellant put in evidence, on the hearing before the master, a declaration in assumpsit, in the Superior Court of Cook County, by the above named company, as plaintiff, against appellant and his wife, as defendants, alleging the delivery to Hersey, by contract with him, of 545 barrels of lime, for use in appellant's building, and which was used in the building. Mantonya testified that the suit was still pending. No objection for want of parties was made either before the master or the court, and can not be made here for the first time. Portones v. Badenoch, 132 Ill. 377; Berndt v. Armknecht, 50 Ill. App. 467.

If the evidence on the question whether the price of \$31,000 was fraudulently fixed by appellant and Hersey, for the purpose of defrauding sub-contractors, had been submitted to a jury in a case at law, and the jury had found affirmatively, as did the master, the verdict, in view of the conflicting evidence presented by the record, could not, on well settled principles, have been set aside, and we can not say that the master's finding on that question is not supported by the evidence. Counsel object that there is no finding of the master of the amount due the Powers Duplex Regulator Company. The master finds that, January 6, 1894, Mantonya wrote a letter to the Regulator company, which is set out in that company's cross-bill. The letter is not set out in appellant's abstract, but, referring to the record, we find it to be as follows:

"CHICAGO, Jan'y 6, 1894.
POWERS DUPLEX REGULATOR CO.,
90 Ill. St., City.

GENTLEMEN: You will please attach to the heaters in my flat buildings, 374, 376 and 378 Dearborn Ave., two of your 1 and three of your 3 automatic regulators, for which I agree to pay two hundred dollars on the first day of March next.

Yours truly,
L. B. MANTONYA."

The master further finds that the regulators mentioned in the letter were put in, and that nothing was ever paid for them. The names of the witnesses in respect to the claim of the Regulator company are set down in the abstract

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and after each is, “testified concerning claim of the Powers Duplex Regulator Company as to matters not here material.” None of the testimony of the witnesses in respect to the claim is abstracted. This being the case, it must be presumed that the evidence warranted the master’s finding, which was, in substance, that the company was entitled to recover the amount mentioned in appellant’s letter. The court decreed that amount with interest in favor of the company.

Appellant’s counsel object that appellee’s petition, as amended, confines him to relief under section 45 of the statute; that the master erred in finding \$6,500 in appellant’s hands, after ascertaining the fair price of the work as prescribed by section 29 of the statute; that the decree is erroneous in taxing against appellant the master’s fees due from Reilly, the Powers Duplex Regulator Company and appellant, and in decreeing the sale of appellant’s interest in the premises *en masse*.

We think the petition, as amended, sufficient on which to base the relief granted. The master’s fees above mentioned were properly charged to appellant. The building was erected on one lot and the adjoining ten feet of another, was under one roof, and was properly decreed to be sold as a whole. *James v. Hambleton*, 42 Ill. 308; *Orr v. Life Ins. Co.*, 86 Ib. 260.

Notice of lien not having been served on Ella W. Mantonya, her interest in the premises was held not chargeable.

We find no reversible error in the record, or any error of which appellant has good cause to complain. The decree will be affirmed.

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Aaron B. Mead et al. v. Francis B. Peabody et al.

1. CONSTRUCTION OF CONTRACTS—*Assumption of Mortgage Debt by Grantee of the Fee.*—When the mortgage debt is specified in the clause by which the grantee of the fee assumes and agrees to pay, then the grantee undertakes to pay the entire amount of the debt, although the

mortgage covers other lands as well, and his liability in such case is not limited to such part thereof only as is equitably chargeable upon the lands purchased.

Bill to Foreclose a Trust Deed.—Cross-bill, etc. Appeal from the Circuit Court of Cook County; the Hon. MURRAY F. TULEY, Judge, presiding. Heard in this court at the October term, 1898. Affirmed. Opinion filed June 12, 1899.

Statement of the Case.—This cause originated in a bill to foreclose a trust deed, filed by Peabody and Hough-teling, to which Edward M. Olson, appellee, and Aaron B. Mead, appellant, with others, were parties defendant.

The controversy in the case arises upon the question as to whether Olson or Mead shall be decreed to be, as between themselves, primarily liable to pay the debt involved in the foreclosure. Olson was the maker of all the notes in question, and together with his wife, conveyed as surety the property subject to the foreclosure. Afterward Olson and wife conveyed part of the premises by special warranty deed to the wife of Mead. As the only consideration for such transfer to his wife, appellant Mead entered into the following agreement in writing:

“I, A. B. Mead, in consideration of conveyance by Edward M. Olson, by special warranty deed to Mary E. Mead, dated the 10th day of July, 1890, of certain real estate, hereby agree to pay, protect and save harmless the said Edward M. Olson from all loss, damage or expense on account of any and all notes executed by said Olson, which may be secured by trust deed on lot 3 and N. $\frac{1}{2}$ of lot 4; lots 6, 7, 8, 25, 26, 27 and 28, all in block three (3) in Nils F. Olson’s subdivision of all the part of the northwest quarter of the southwest quarter of section thirty-six, township forty north, range thirteen east of the third principal meridian, lying west of Clarkson Ave., in the city of Chicago, county of Cook and State of Illinois. I also agree to pay a bill of \$30 for plumbing done in No. 45 Clarkson Ave., to H. Hogan, also a bill of \$50 to Speigle & Co., for mantels put in No. 45 and 53 Clarkson Ave.

Signed, A. B. MEAD.”

Olson filed his cross-bill, setting up that by force of this agreement Mead had assumed and undertaken to pay all of

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the notes which secured the debt upon which the original bill to foreclose was brought.

Mead answered, admitting the execution of the agreement in writing, but averring, in substance, that the undertaking was in respect to another trust deed and the notes thereby secured, and had no relation to the notes of Peabody and Houghteling, and that Mead at the time of making the agreement had no knowledge of the existence of the latter notes.

There was practically no contest upon the original bill. Upon the cross-bill of Olson and answer of Mead and replication thereto, there was a hearing before a master in chancery. It was, in effect, contended by appellant Mead that he had, by the written agreement, assumed and agreed to pay certain notes aggregating \$7,900, secured by trust deeds, which were a first lien upon the property, and so much only of the second mortgage debt of \$7,000 as should be equitably charged against the lots conveyed to Mrs. Mead. On the other hand, appellee Olson contended that by the writing Mead had assumed and agreed to pay not only the \$7,900, but as well the entire note of Olson held by Peabody and Houghteling for \$7,000, secured by a junior trust deed, being the note which is the basis of the original bill to foreclose.

It appeared that after the contract by Mead to pay Olson's notes was entered into, Olson had paid sums amounting, with interest, to \$2,239.30 upon the Peabody and Houghteling note.

The master's report found that by the agreement Mead assumed only the \$7,900 note, admitted, and so much of the \$7,000 note as was equitably chargeable upon the lots named in the agreement. There were other lots of land than those named in the agreement as conveyed to Mrs. Mead by Olson, which were subject to the trust deed securing the \$7,000 note.

The chancellor sustained exceptions of Olson, cross-complainant¹ to the master's report, and found that Mead not only assumed and by his agreement in writing undertook to

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pay the part of the \$7,000 equitably chargeable to the lots conveyed by Olson to Mrs. Mead, but that Mead had thereby assumed and agreed to pay the entire amount of the \$7,000 note. The decree finds that Mead is primarily liable, as between himself and Olson, for the entire amount of the Peabody and Houghteling note, which is the subject of the original bill to foreclose; and orders that Olson have execution against Mead for the amounts paid by Olson upon the Peabody and Houghteling note after the contract by Mead was entered into. It orders the premises conveyed by Olson to Mrs. Mead to be sold first, and orders that if after the coming in of the master's report of sale it should appear that a sale of the other mortgaged premises was necessary, then Olson should have execution against Mrs. Mead "for the amount realized from the sale of such other premises."

CHARLES H. HAMILL, attorney for appellants.

CHYTRAUS & DENEEN, attorneys for Edward M. Olson, appellee.

OPINION PER CURIAM.

The only question presented by this appeal is the construction of the agreement in writing entered into between appellant A. B. Mead and appellee Olson.

The various lots of land mentioned in the agreement were, at the time the agreement was made, subject severally to incumbrances which constituted a first lien and aggregated in amount \$7,900. They were also, except lot 26, subject to a second mortgage of \$7,000, which covered also certain other lots than the ones included in the written agreement. The question presented is whether the undertaking of Mead was to pay the second mortgage notes, and if so, whether to pay them in full, or only so much of them as should be equitable--treated as a charge upon the lots mentioned in the agreement. While by answer to cross-bill, appellant presented the theory of accident or mistake in the making of the contract, which by its terms includes all notes of Olson secured upon the lots in question, yet upon the hear-

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ing no such defense was presented. Mr. Mead very frankly states in his testimony, that he was aware of the existence and lien of the Peabody and Houghteling note, *i. e.*, the \$7,000 junior incumbrance, before he made the written agreement, and had negotiated with Peabody and Houghteling for release of the lots conveyed to Mrs. Mead upon payment of a stated amount.

We can not assent to the contention of counsel for appellant, that there is any ambiguity as to the subject-matter of the contract, *i. e.*, the notes which required extrinsic evidence, or made such evidence admissible to indicate that notes were contemplated by the parties to the agreement. We are of opinion that the notes which appellant contracted to pay are all the notes of Olson which were then secured upon the lots described, or upon any of those lots. But if there is ambiguity, and if the evidence admitted upon the hearing is proper for the purpose of determining what notes are the subject-matter of the contract, then the result is the same, for the evidence fully warrants the conclusion reached by the chancellor that all the notes of Olson here in question, including the \$7,000 note, were subject-matter of the contract.

Counsel for appellant does not seriously contend for a construction of the contract which would altogether exclude from its operation the \$7,000 note in question. He concludes his brief by asking that the decree be reversed and a decree directed “by which Mrs. Mead’s lots should bear only their just proportion of complainant’s incumbrances, and Mr. Mead shall be charged with personal liability as to that proportion only of the debt that the value of the lots conveyed to Mrs. Mead bore at the time of conveyance to the value of all the lands subject to the incumbrance.”

It is then to be determined whether the written agreement should be construed to be an undertaking to pay all of the \$7,000 incumbrance, or only such part thereof as is equitably chargeable to the lots purchased by Mrs. Mead. The contract in writing was made as a substitute for a

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clause in the special warranty deed from Olson to Mrs. Mead by which Mrs. Mead, the grantee, should assume and agree to pay all mortgage liens on the lots. There is no dispute as to this fact. But the substitute, *i. e.*, the contract by Mrs. Mead, does not undertake to do more than merely assume and pay all liens or incumbrances upon these lots, in that it specifically undertakes to pay "all notes executed by Olson which may be secured by trust deed" on these lots.

The authorities are in harmony to the effect that when the mortgage debt is specified in the clause by which the grantee of the fee assumes and agrees to pay, then the grantee undertakes to pay the entire amount of the debt, although the mortgage covers other lands as well, and his liability in such case is not limited to such part thereof only as equitably chargeable upon the lands purchased. 1 Jones on Mortg., Sec. 743; Welch v. Beers, 8 Allen, 151; Wiling v. Campbell, 106 N. Y. 325.

Counsel for appellant, in support of his contention that the liability should be construed as limited to the proportion of the mortgage debt only with which the lots in question are equitably chargeable, cites Hoy v. Bramhall, 4 C. E. Green (N. J.), 74.

But in that case the subject-matter of the undertaking was "the payment of all liens now on said premises." If the language here to be construed was like to that, and if all that Mead had undertaken by this contract had been to pay "all liens" upon the lots in question, then a like conclusion might here obtain. But here the appellant agreed to pay, not the debt to the extent that it was a lien upon these lots, but "the notes."

We are inclined to view the construction put upon the contract by the learned chancellor as correct.

This is, however, one respect in which the decree is erroneous. It provides that after the sale of the lots conveyed to Mrs. Mead, if the mortgage debt is not thereby satisfied then the other lots covered by the mortgage shall be sold, and that Olson shall have execution against Mead for the

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amount realized from such sale of the latter premises. This is erroneous. The premises last mentioned might sell for much more than the total of the obligation assumed by Mead. The decree should have awarded execution to Olson in this behalf only for an amount equal to such part of the mortgage debt as was not satisfied by the sale of the lots conveyed to Mrs. Mead.

We do not regard the order that the lots conveyed to Mrs. Mead be first sold, as erroneous. If she were a purchaser for value, the question would be different. But it appears, and the decree so finds, that the only consideration for the conveyance by Olson to her was the undertaking of Mr. Mead in the written contract. It was one transaction. Her interest in and rights to the lots conveyed can not be held to be any better in this behalf than would the interest and right of Mr. Mead if the conveyance had been made to him.

With the modification above suggested, the decree is affirmed.

Norton Brothers (a Corporation) v. Samuel C. Eastman.

1. **EVIDENCE—*Evenly Balanced Testimony*.**—It is not true, as a matter of law, that because the only evidence in a case consists of one witness affirming and one witness denying a fact in issue, that the jury or the court in passing upon the evidence, may not find that there is a preponderance in favor of one or the other of the parties.

2. **CONSIDERATION—*Settlement of a Controversy*.**—A settlement of a controversy is a sufficient consideration for a promise to pay a certain amount in discharge of the alleged liability.

Assumpsit, on promises, etc. Trial in the Circuit Court of Cook County; the Hon. RICHARD W. CLIFFORD, Judge, presiding. Finding and judgment for plaintiff; appeal by defendant. Heard in this court at the October term, 1898. Affirmed. Opinion filed June 12, 1899.

Statement of the Case.—Appellee leased premises to appellant, upon which the latter conducted a manufacturing business. During the term of the tenancy the buildings leased were destroyed by fire. Both landlord and tenant

recognized the lease as terminated by the destruction of the building. A controversy arose between them, however, as to the duty and liability of appellant to remove from the premises such part of the *debris* remaining after the fire as consisted of merchandise (tin ware) and machinery owned by appellant. Negotiations were had in this connection between Mr. Dwen, acting on behalf of appellee, and the Messrs. Norton, representing appellant. Dwen testified that O. W. Norton said, "If you take away the bricks and timber of the building and uncover our stuff that you want us to remove, we will remove it;" and that when the bids for removing all the *debris* were submitted to Mr. Norton and he was informed that the estimates for appellant's share was \$375, Mr. Norton said, "We will assume that. We think it only correct that we should." Mr. Norton testified that he made no such statement or promise.

Appellee had the work done as per estimates thus said to have been submitted to appellant. Appellant refused to pay, and this suit was brought. The declaration as amended consists of two counts upon the covenants of the lease and the common counts.

The covenant relied upon is as follows:

"And upon the termination of this lease in any way will yield up said premises to said party of the first part in good condition and repair, (loss by fire and ordinary wear excepted,) and will deliver the keys at the office of Peabody, Houghteling & Co., aforesaid."

The issues were submitted to the trial court without a jury. The court, by rulings upon propositions of law submitted, held that there could be no recovery upon the covenant. But the court found the issues upon the common counts for the plaintiff, appellee, and assessed appellee's damages at \$375. From judgment upon such finding this appeal is prosecuted.

HERRICK, ALLEN, BOYESEN & MARTIN, attorneys for appellant.

PADDOCK, WRIGHT & BILLINGS, attorneys for appellee.

Norton Bros. v. Eastman.

MR. JUSTICE SEARS delivered the opinion of the court.

But two questions are presented upon this appeal, viz.: first, is the evidence sufficient to sustain the finding of the trial court, that appellant, through its agent, Mr. Norton, undertook to pay the sum of \$375 for the removing of the *debris*; and second, if such undertaking was sufficiently established by the evidence, is it supported by any valid consideration, or is it without consideration and therefore *nudum pactum*. The evidence as to whether appellant, through Mr. Norton, made the promise and entered into the undertaking relied upon, might appear to one reviewing it as evenly balanced. Yet it can not be said that, as a matter of law, because the only evidence consisted of one witness affirming and one witness denying the fact in issue, therefore the jury or the court passing on the issues of fact, might not have found that there was a preponderance in favor of the one or the other. If it was formerly held that in such case there could be no preponderance in favor of the litigant having the burden of establishing the fact, such is no longer the rule. *Durant v. Rogers*, 71 Ill. 121; *Durant v. Rogers*, 87 Ill. 508; *Dickinson v. Gray*, 72 Ill. App. 55.

We can not say that the finding by the trial court upon the issues of fact is not sufficiently supported by the evidence.

There remains, then, only the question as to whether there was a sufficient consideration moving to appellant to support the promise. Mr. Dwen testified:

"I visited O. W. Norton and we had probably three-quarters of an hour conversation, and he said he would pay for a share for the removal of the *debris*, and I insisted on it."

Mr. Norton testified:

"We had several conversations, and I took the ground always that we were not responsible for the wreck. The only thing I had said which could be construed at all as any promise on our part to do anything in the matter was on his claim that he had a lot of stuff there that we ought to take out. I think I suggested to him that possibly we might be responsible; if he would remove the brick and

other material which covered whatever stuff we might have left there, that we would take out what property there was remaining. As to any agreement to pay any sum, I never agreed to that."

It is apparent that there was a controversy between the parties as to the liability of appellant, and that settlement of such controversy was a sufficient consideration for a promise to pay a certain amount in discharge of the alleged liability. Nor does it matter that if the controversy had not been settled, appellant would have prevailed in the contention that it was not liable. *McKinley v. Watkins*, 13 Ill. 140; *Sigsworth v. Coulter*, 18 Ill. 204; *Miller v. Hawker*, 66 Ill. 185; *Honeyman v. Jarvis*, 79 Ill. 318; *Parker v. Ens-low*, 102 Ill. 272; *Stoehlke v. Hahn*, 158 Ill. 79.

It is urged by counsel for appellant that inasmuch as the appellee had never demanded of appellant more than \$375, the promise to pay that amount could not be held to be a compromise of a dispute, *i. e.*, an undertaking to pay a lesser sum in satisfaction of a disputed claim for a greater sum. The controversy here was as to the liability of appellant to remove all such parts of the *debris* as were made of its property, and not as to the payment of money. To settle the controversy, and in lieu of doing that which appellee insisted it should do, appellant undertook, so the court found, to pay \$375. We think this constituted a sufficient consideration.

The trial court having found that there was an agreement by appellant to pay the \$375, and there being sufficient consideration to support such agreement, we find no reason for disturbing the judgment. It was not error to allow the amendment of the declaration after the evidence had been heard. Appellant did not, at the time of the amendment, ask for further opportunity to present evidence. The judgment is affirmed.

Patrick McDermott v. Chicago City Ry. Co.

1. **VERDICTS—Upon Conflicting Testimony.**—A verdict upon conflicting testimony will not be set aside where there is evidence on the side of the successful party to sustain it.

Action in Case, for personal injuries. Trial in the Superior Court of Cook County; the Hon. PHILIP STEIN, Judge, presiding. Verdict for plaintiff, nominal damages; error by plaintiff. Heard in the Branch Appellate Court at the October term, 1898. Affirmed. Opinion filed June 9, 1899.

Statement.—In his brief and argument, counsel for plaintiff in error states the case, as now before this court, as follows:

“This writ of error is prosecuted to reverse a judgment of one dollar damages, rendered in favor of the plaintiff in error, in an action on the case.

The grounds upon which a reversal is asked are, first, that the damages are unreasonably inadequate, and, second, because of certain errors going to the question of liability.

The facts of the case briefly are as follows: The plaintiff was one of a number of police officers stationed at Fiftieth and State streets, in the city of Chicago. Upon the night in question, a fire alarm was sounded, which rendered it necessary that the patrol wagon and a number of police officers should proceed with haste to the fire, which was a considerable distance to the east. The policemen, including the plaintiff, boarded the patrol wagon, which was driven by Zindell, a man employed for that special purpose. The wagon was covered, with a curtain in front, immediately behind the driver's seat. There was a heavy gong on the wagon, in a position where the driver could ring it with his foot while driving.

“The wagon proceeded immediately east on Fiftieth street to Indiana avenue, where, while crossing the street car tracks, it was struck by a south bound electric car belonging to defendant, was turned upside down, and the plaintiff and several other officers were seriously injured.”

In addition to the foregoing, it should be stated that plaintiff in error was in charge of the patrol wagon; that

he was on the seat with the driver, although at the moment of the accident he had partially turned, so that his back was toward the approaching car, while he was assisting to roll up and fasten the curtain which was across the wagon, back of the seat upon which the driver and the plaintiff in error were seated.

JAMES C. McSHANE, attorney for plaintiff in error.

WILLIAM J. HYNES and SAMUEL S. PAGE, attorneys for defendant in error.

MR. JUSTICE HORTON delivered the opinion of the court. A motion was made by defendant in error to strike from the files the abstract of record filed by plaintiff in error. That motion was reserved to the hearing. Although said abstract is in some important respects defective and insufficient, yet as we have used it, in the study of this case, the motion will be denied.

We are not disposed to disturb this verdict upon the contention that it is contrary to the evidence. There are some sharp conflicts in the testimony. The testimony of plaintiff in error as to his injuries is not as plain and frank as it might be. The fact that the physician who attended him was not called as a witness may have impressed the jury unfavorably as to what injury he may have sustained. The trial judge and the jury saw the witnesses. From our knowledge of the attorney for plaintiff in error, and his ability, we are very confident that the case of plaintiff in error was presented to the jury with all the force and persuasion that the facts would possibly warrant. We see nothing to indicate that the jury were prejudiced against the plaintiff in error, or in favor of defendant in error.

Plaintiff in error was a policeman in the employ of the city of Chicago. He says he has been a "wagonman" all the time, just the same as before the accident. His salary was paid in full the same as though the accident had not happened. Counsel for plaintiff in error, in his printed argument says, referring to plaintiff in error: "His doctor bills

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and medicines also amounted to a considerable item." I do not find from abstracts of his testimony that he stated that he had paid anything therefor, or that he was liable therefor. If disposed so to do, the jury could not include in their verdict anything for doctor bills or for medicine, because there was no proof upon which to base it. We see no reason for disturbing the verdict of the jury upon any question of fact. As to plaintiff in error, the verdict is not "manifestly against the weight of evidence."

Counsel for plaintiff in error also contend that the trial court erred in instructing the jury, and in refusing an instruction asked by him. His abstract purports to give or refer only to "plaintiff's refused instruction." What, if any, instructions were given for him, the abstract does not show. The only refused instruction quoted or specifically referred to by counsel for plaintiff in error directed the jury that if they believed from the evidence, certain things indicated, then they should find the defendant guilty. That instruction makes no reference whatever to the question of damages. It is limited exclusively to the question of whether the jury should find the defendant guilty. The verdict is that the defendant was guilty. If that instruction was in all other respects good, as to which we express no opinion, yet, as the jury did all that it required, there was no reversible error in refusing to give it.

In none of the instructions given for defendant was there any direction as to damages. They were all addressed to the question of the guilt or innocence of the defendant. One of the instructions asked for plaintiff in error, and which was directed to the question of damages, was modified and given by the court. There is no contention in brief and argument for plaintiff in error that such modification was improper.

Under some circumstances a verdict for merely nominal damages may, perhaps, be treated as a finding for the defendant. But this is not such a case. Here the jury may have very properly concluded that, under the evidence and the instructions of the court, plaintiff in error was entitled

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to damages, but that the proof established only nominal damages.

Perceiving no error, and for the reasons indicated, the judgment of the Superior Court is affirmed.

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**E. E. Naugle, W. H. Holcomb and A. P. Hopkins v.
Charles T. Yerkes.**

1. RESCISSION OF CONTRACTS—*When the Parties Can Not be Placed in Statu Quo.*—A contract can not be rescinded, when from any cause the parties can not be placed in *statu quo*.

2. SAME—*Equity Jurisdiction.*—Equity does not deal with things in the abstract, but with actual dealings. The court holds that no case for rescission is made by the bill in this case, and no equity being shown, except such as the law side of the court has ample means for enforcing, the bill was properly dismissed.

Bill in Equity. to obtain the rescission and cancellation of an agreement in writing. Trial in the Circuit Court of Cook County; the Hon. MURRAY F. TULEY, Judge, presiding. Bill dismissed on demurrer; appeal by complainant. Heard in the Branch Appellate Court at the October term, 1898. Affirmed. Opinion filed June 9, 1899.

CHARLES H. ALDRICH, attorney for appellants.

KNIGHT & BROWN, attorneys for appellee.

MR. JUSTICE SHEPARD delivered the opinion of the court.

The appellants exhibited their bill in equity to obtain the rescission and cancellation of a certain agreement in writing, dated July 26, 1897, made between themselves, as the firm of Naugle, Holcomb & Co., and the appellee, Yerkes, and to obtain from Yerkes an accounting for certain bonds and stocks of the Suburban Railroad Company, received by him in pursuance of said agreement, and the possession of said railroad and the income therefrom since the date of the agreement, and for such other, further and different relief as might be equitable.

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A demurrer, both general and special, was sustained to the bill, and the bill dismissed for want of equity, but without prejudice to an action at law by appellants.

The Suburban Railroad Company (originally the "Suburban Electric") was the beneficiary of certain city, town and village ordinances under which it was entitled to construct and operate a line of railroad in Cook and other counties, and the Suburban Construction Company had the contract for building and equipping the road.

By contract with the latter company the appellants undertook the construction of the road and did a large amount of work upon it. A part of the road was substantially completed, and was being operated by appellants, who, under their said contract, were in control and possession of the whole line. Controversies and litigations arose, fostered, as alleged by appellee, between other parties in interest, including the Suburban Construction Company and the appellants, whereby the financial and physical ability of appellants to complete the road in time to save its rights under the ordinances, or some of them, was imperiled, if not destroyed. Thereupon, and under such circumstances, the contract sought to be rescinded was entered into between appellants and appellee.

By the terms of the contract in question appellants agreed to procure the resignation of the then existing boards of directors of both the Suburban Railroad Company and the Suburban Construction Company, and cause to be elected in their places such other persons as appellee should designate, and this was done; there was also assigned to appellee a large if not a controlling interest in the stock and bonds of said railroad corporation; the contract of appellants with the Construction company was agreed to be and was assigned by appellants to appellee personally; the appellants also agreed to complete the unfinished part of the road and do what is termed in the contract certain "special" work, including the building of a power house.

For all these things and others appellee agreed to pay certain large sums of money and assume certain large liabilities and obligations of the appellants.

For the "special" work to be done in connection with the construction and equipment of the road, including the building of a power house by appellants, the appellee was to pay for at cost, to be determined by one M. K. Bowen.

It is in connection with the determination by Bowen of the cost of this special work and the building of the power house that the *gravamen* of the bill lies, and the appellants aver they have not received or accepted anything on account of the contract since they discovered the relations between appellee and said Bowen. The bill alleged, in respect of Bowen's relations with appellee, as follows:

"Your orators further show that immediately upon the execution of said contract your orators turned over to said Yerkes and his agents, the stocks and bonds in their possession in accordance with the terms thereof and the possession of said railroad, although they continued to operate the same for a period as provided in said contract. Various sums of money were paid to your orators, and your orators were expecting to go on with the provisions of said contract, when they learned that M. K. Bowen—to whom there was assigned, under and by the terms of the said proposition and contract, the duty of ascertaining the cost of certain special work and the power house, no part of the cost of either said special work or said power house having yet been paid to your orator—had been employed by said Charles T. Yerkes as his agent and representative in the matter of estimating and reporting the cost and price to be paid for the special work and the power house under the terms of said contract; and instead of impartially and justly investigating the actual cost to your orators and their predecessors in interest of the matters and things so to be investigated and ascertained by him, he regarded himself, by virtue of such employment, as the agent and representative of said Charles T. Yerkes, and bound to obey the instructions of the said Charles T. Yerkes therein; and openly confessed to your orators that he would return the cost at one-half or one-third the actual cost if he was so instructed by said Charles T. Yerkes."

We infer from the bill and the statements in appellants' brief that, except for such alleged interference by appellee with the impartiality of Bowen, the appellants would not claim they had any ground for asking the intervention of a court of equity in the premises.

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Counsel for appellants says in his brief as follows:

"The court will observe from a reading of that contract that while the price of some parts of the property is agreed upon and specified therein, the sum to be paid for the power house, then in process of construction, and for the special work used in the construction of the road, was left to be ascertained by one M. K. Bowen. * * * The complaint of the bill is, that upon the execution of this contract and immediately thereafter, and after the appellants had delivered into the possession of the appellee the railway property in question and the bonds and stocks of the railroad company as provided therein, the appellee, Yerkes, unwilling to leave Mr. Bowen an impartial factor in this important transaction, and with his mind and judgment unhampered by undue influences in the premises, secured Mr. Bowen into his employment and gave Mr. Bowen to understand what his wishes were in the matter of the determination by him of the costs of these various properties, and thereby rendered it impossible for Mr. Bowen to act as a fair and impartial arbiter in the matters assigned to him. * * * When appellants became apprised of this disposition on the part of Mr. Bowen in the matters assigned to him by the contract, they refused to consent to Mr. Bowen's further action in the premises, and received no further payments from the appellee upon the matters provided in the contract, and filed their bill for a rescission of the contract, praying for a cancellation thereof, and offering to restore to the appellee all sums received by them, or paid by him for their account, under and in pursuance of said contract. * * * The bill avers that by the fraudulent conduct on the part of appellee in so taking Bowen into his employment, and because of the consequent prejudice of said Bowen against appellants in reference to the matters left to his determination, it is impossible for appellants to receive the full benefits of the contract to which they would otherwise have been entitled, and prays a cancellation thereof, and a return to them of the stocks and bonds received by appellee from them, and a restoration to them of the possession of the property received from them and held by appellee, and for necessary injunctive orders in connection therewith."

The contract set forth in the bill provided for the payment by the appellee of large sums of money, aggregating several hundred thousand dollars, which the necessary inference is, it not being negatived, have been paid to or for appellants.

Indeed, we have been unable to find in the bill or in the brief of appellants, any claim that the appellants remain entitled to receive anything more except for the special work and power house, the cost of which was to be determined by Bowen. There is an allegation in the bill to the effect that an item of \$50,000, assumed to be paid to the Pullman Company by appellee, has not been paid, but no relief appears to be asked on that account.

We have unsuccessfully searched the bill to find how much of the special work was done by appellants before they discovered the alleged fraudulent arrangement between appellee and Bowen, or how much of it remained to be done, or what the fair worth is of that part that was done.

The inference probably is that no part of the special work has been paid for, but how much it is that appellants have done, for which they ought to be paid, we do not find averred, nor its value.

This case thus seems to be that appellants have been paid for everything except the special work and power-house, and if they have done anything to entitle them to be paid in such respects, no statement as to what, if anything, they are in good conscience entitled to for such matters, appears in the bill.

Probably some of the work was done, for it is alleged that Bowen made a pretended report, as to some matters which are not stated, "fixing the sums in many instances at less than one-half what was actually due to your orators." The intendment from such an allegation is that in all other "instances" the report was proper and correct, and the bill is silent as to what amount was involved in the "many instances" mentioned.

The theory of the bill seems to be that because of the incapacity of Bowen, through fraudulent design, or otherwise, to impartially fix the value of particular items of work, everything that had been done and paid for should be turned back to appellants, they refunding what they had received for it.

Here was a partly completed road that was, in effect, sold to appellee for several hundred thousand dollars. By

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contract between appellants, the vendors, and appellee, the vendee, the former substantially completed the road and were paid by appellee for so doing.

But now because of certain special work to be done by appellants, concerning which differences have arisen, and the method provided by the contract of ascertaining the value thereof has become corrupted so it can not be availed of, appellants ask to have back the completed road in place of the uncompleted one they sold, they paying back to the vendee all that he has paid out, less the income of the road in the meantime. It would be impossible from the nature of the transactions and the necessary inferences from what the bill alleges, to put the parties in *statu quo*.

To grant such a decree upon the showing made, would be inequitable in the extreme, even if all the proper parties, for such a decree to be effectual, were before the court. No fraud is alleged in the making of the contract sought to be rescinded—the most that can be said in respect of that is that it was the result of hardship in the bringing about of which appellee was in a measure instrumental. Equity does not deal with things in the abstract, but with actual dealings, and so far as has been pointed out, or as we can see, there is not enough in the bill for it to take hold of. It can not be invoked here because of inadequacy of legal remedies, for it would seem that if anything is due to appellants for the work to be valued by Bowen the law would afford complete redress, notwithstanding the alleged fraud by him. No case for rescission is made by the bill, and no equity being shown, except such as the law side of the court has ample means for enforcing, the bill was properly dismissed, and the decree is affirmed.

Frank R. Chandler v. Clara E. Ward.

1. AMENDMENTS—*After the Master's Report*.—After the master's report and the objections thereto are filed in the court below, it is not an abuse of the discretion reposed in the trial court to deny a motion for leave to file amendments to cross-bill.

2. **USURY—Under Name of Commissions.**—A party can not be allowed to collect or receive usury by simply calling the same commissions.

Bill of Foreclosure.—Trial in the Circuit Court of Cook County; the Hon. EDWARD F. DUNNE, Judge, presiding. Decree for complainant; appeal by defendant. Heard in the Branch Appellate Court at the October term, 1898. Affirmed. Opinion filed May 26, 1899.

Statement.—May 7, 1896, this bill of complaint was filed in the Circuit Court of Cook County. It is not deemed necessary to state fully the details of the many complications in this case, but it is believed that the following statement of fact, in connection with such facts as appear in the opinion, is sufficient to enable the reader to understand the questions involved and the views of the court.

Appellee made nine loans from the firm of P. R. Chandler & Co. After this case was at issue, and after a part of the testimony had been taken before the master, Peyton R. Chandler departed this life, leaving the appellant the only surviving member of said firm. The death of said Peyton R. was suggested of record, and this suit thereafter continued in the name of appellant as such survivor. In this statement, from this on, and in the opinion of the court, unless otherwise specially stated, appellant will be regarded and spoken of as though he had been originally the only person interested in said firm.

The payment of three of these loans, five years after date, is secured by notes and trust deeds, dated October 1, 1895. The payment of the other six of said loans, three years after date, is secured by notes and trust deeds, dated November 25, 1895. All of said notes and trust deeds are executed by appellee and her husband. Each one of said nine trust deeds conveys real estate belonging to appellee. The interest on each and all of said loans is at the rate of six per cent per annum, payable semi-annually, and is evidenced by interest coupons. The aggregate amount of said loans, exclusive of interest, is \$21,900. They are what are called "building loans." All of said notes are payable to the order of the makers thereof, and are by them indorsed in blank.

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On behalf of appellant it is contended that the buildings to be erected upon the several lots described in said trust deeds were each to cost specified sums. On the part of appellee it is contended that such buildings were to be like certain other designated buildings, without regard to the question of cost. Appellee erected a building upon each one of said lots which did not cost more than about one-third the amount which appellant claims was to be the cost thereof, but which were substantially like the buildings which appellee claims were agreed upon as the pattern. Appellant paid to appellee on account of said loans \$1067.81, and declined to pay any further sum on account thereof.

As to the first three of said loans, they being for five years, a commission of six per cent, and as to the other six of said loans, they being for three years, a commission of five per cent, was to be paid by appellee to appellant. This, it is contended by appellee, constitutes usury.

The original bill of complaint prays for an accounting as to said nine loans, and as to what is there called "said exorbitant and usurious commissions;" that said trust deeds be decreed to be clouds upon appellee's title; that they be set aside, and said notes be surrendered and canceled; and that if appellant has sold said notes, or for any other reason this can not be done, appellant be decreed to consummate the loans and pay to appellee the balance thereof.

Prior to the making of any of said nine loans, appellant had made to appellee twenty-one other building loans. Notes, interest coupons and trust deeds were made for each of said twenty-one loans, substantially the same as for each one of said nine loans. All of the principal notes and the interest coupons in the thirty loans had been sold and delivered by appellant to various purchasers prior to the filing of said bill of complaint. They were not indorsed by appellant or his firm, and there is no contract liability shown to exist upon the part of appellant upon said notes or either of them.

On behalf of appellant it is contended that in equity all of said thirty loans should be treated as one transaction;

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that the several buildings erected upon the lots embraced in said twenty-one loans were not of the kind or value agreed by appellee to be erected; that appellee thereby perpetrated a fraud upon appellant and upon the owners of said securities; that appellant did not discover such fraud until after said nine loans had been negotiated and the papers securing the same executed and delivered; and that therefore appellant declined to pay to appellee any further sum on account of said nine loans.

The original bill refers to the nine loans only, and makes no mention of the other twenty-one loans. Upon answering said original bill, appellant filed a cross-bill, setting out said twenty-one loans, and praying that appellee be decreed to fulfill the agreement as to erecting buildings of the value claimed by appellant to have been agreed upon, and that in case the performance of such agreement is now impracticable, then, as stated in the prayer of said cross-bill:

"That all such loans be equitably scaled down, so that the amounts then outstanding as loans against said premises shall bear the same ratio to the cost of land and buildings as the amounts originally loaned thereon, bear to the valuation of land and buildings contained in said written applications for loans, and that if it shall be found that cross-complainants have advanced more than they were equitably required to advance at such a ratio, then that a decree be entered for such excess and that execution issue therefor."

Alfred L. Ward (the husband of appellee) and "the unknown owners and holders of said notes and trust deeds" are made parties defendant to said original bill. They are not brought into court, and do not appear or answer the bill, neither is the bill dismissed as to them. Appellee and said Alfred L. Ward are made defendants in said cross-bill and answer the same, thereby substantially admitting the allegations of the original bill to be true. In the brief for appellee filed in this court, it is proposed to file a written stipulation by said Alfred L. Ward, binding him by this proceeding, as if he had answered the original bill.

The final decree entered by the Circuit Court provides that appellant procure possession of the several notes and

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trust deeds pertaining to said nine loans, and cause said trust deeds to be released of record and said notes canceled and surrendered within thirty days, and that simultaneously therewith appellee pay to appellant the sum advanced by appellant to appellee on account of said nine loans, viz., \$1,067.81, and that in case appellant shall not procure such release, surrender and cancellation upon the payment by appellee of such advances, that then appellant pay to appellee the balance of the amount of said loans, viz., \$20,842.19. The decree disallows the commissions to appellant, and allows to appellee interest on the balance found not to have been paid to appellee by appellant at the same rate appellee is bound to pay therefor by said notes and interest coupons. It is also decreed that said cross-bill be dismissed for want of equity, and that appellant pay the costs to be taxed.

The money necessary to complete said loans is in the hands of appellant, and was by him credited to appellee.

STILLMAN & MARTYN, attorneys for appellant.

ST. JOHN & MERRIAM, attorneys for appellee.

MR. JUSTICE HORTON delivered the opinion of the court.

Buildings have been erected upon the lots conveyed as security in all of the loans mentioned in this case. If they are not in accordance with agreements between the parties, it is impracticable now to make them so. Hence the rights of the parties must be settled upon the existing facts and situation.

And first as to the parties. Alfred L. Ward was made a party defendant to said original bill, but was never served and did not answer. Appellee may file in writing in this court within ten days such a stipulation by Alfred L. Ward as shall bind him and fully protect appellant. It would seem that said Alfred L. Ward is now estopped and bound by this record, but such a stipulation will remove all question as to that.

As to the unknown owners of the notes. Appellant in his brief and argument says that he "individually and on

behalf of the legal holders of the notes referred to in the answer, appeared and answered the bill." Also, "that appellant is personally responsible for any loss they (purchasers of the notes) may sustain upon said loans." Also, that, "appellant himself has a sufficient interest and the necessary privity of contract to insist upon performance of the agreements."

Assuming these positions and statements to be correct, and it does not lie in the mouth of appellant to hereafter deny them, the owners of the notes in question are before the court in so far as it is necessary that they should be in order to determine as between appellant and appellee their respective rights, duties and obligations to each other. Appellant should not be permitted to say that he appeared and answered the bill on behalf of the owners of the notes; that he is personally responsible for any loss they may sustain; that he is entitled to insist upon the performance by appellee of her contracts; that he is an agent acting for an undisclosed principal and custodian and active trustee of the fund, and entitled to act for the *cestui que trust* coupled with an interest on his part; that the money is in his hands to consummate the loans; and then say that because such undisclosed principals are not formally brought into court, the court can not adjudicate as between the appellant and the appellee; and this too, when appellant fails to disclose the principals, he apparently being the only party to this proceeding who knows who they are. He nowhere states that he does not know who and where they are. If appellant is correct in his statements, such owners are bound by the decree herein. If he is not correct, still the court below had jurisdiction to adjudicate as between appellant and appellee. Appellant will not be permitted to play fast and loose as to whether such owners are or are not before the court, when, by his own statements in his briefs, he appears in this case for and represents them. Whether as between appellee and said owners, the latter are bound by said decree, we do not assume to here determine.

After the master's report and the objections thereto had been filed in the court below, appellant moved the court

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for leave to file amendments to cross-bill. That motion was denied. We do not think that in denying this motion there was any abuse of the discretion reposed in the trial court. It was not error.

It is contended on the part of appellant that he is the active trustee of the holders of all the notes in all of the thirty loans, and that as such he represents such holders and their interests. Suppose that to be so, still that does not change the situation as to the rights of appellee. Suppose that all of these holders agree among themselves that the money in the hands of appellant, not paid over to appellee in the matter of the nine loans, should be used and applied in "scaling down," as asked in the prayer of the cross-bill, appellee is not bound by such agreement. We know of no rule of law by which appellee can be held to be bound thereby, or which would require appellee to assent thereto. Appellant represents such holders severally as well as jointly. Appellee's obligations to said holders and each of them severally is not changed because they all choose the same agent and active trustee. Neither can her rights be changed or abridged by the joint action or agreement of said holders to which she does not assent. We know of no principle of law or equity by which the holders of the notes in the twenty-one loans can sustain a claim upon the money in the hands of appellant on account of the nine loans without the consent of appellee. Their respective rights as against appellee are not changed because they are represented by the same agent and active trustee. The effect of the scaling down, as asked in the prayer of the cross-bill, would be to require appellee, without her consent and against her protest, to accept loans upon her thirty pieces of property in the aggregate about \$20,000 less than the amount agreed upon by her. This can not be done. The court has no power to make new and different contracts for appellee. The cross-bill was properly dismissed.

The first three of the loans described in the original bill are for five years, with interest at six per cent per annum. The other six of said loans are for three years, with inter-

est at five per cent per annum. In all of said nine loans the interest reserved and the commissions, when taken together, amount to more than seven per cent per annum, the highest rate of interest allowed to be contracted for in this State. We are satisfied from the record as a whole that the commissions and interest contracted for should be taken together in considering this question, and that the contract was usurious. The appellant can not be allowed to collect or receive usury by simply calling the same commissions. There is no error in the finding and decree of the Circuit Court as to the charge for commissions.

It is also contended that the court below erred in fixing the amount to be paid by appellee to appellant in case of the return by appellant of the securities, and in fixing the amount to be paid by appellant to appellee in case such securities are not so returned, without a reference to a master to take the accounting. This point is not well taken. There were no complications as to any accounting. It was a very simple matter to fix the sums named. It would have been an unnecessary and useless expense and delay to have made such reference.

Assuming appellant's contention to be correct that appellee failed to erect buildings of the cost and kind as agreed, upon the lots involved in said nine loans, it is impracticable to now make them so. What is the effect? It constitutes a breach of the contract by appellee. Appellant refused to pay any more money on account of said loans because of such breach. He thereupon, in effect, elected to treat the contract as at an end. That was the situation when this bill was filed. If it be conceded that appellant's contention is correct that appellee failed to erect buildings of the kind and value agreed upon, it does not follow that appellee has no rights in the premises which a court of equity will protect and enforce. Appellant should not and will not be permitted to keep the money and still have the notes and trust deeds outstanding as valid and binding. He says that he represents and speaks for the owners of said notes. If there was any damage arising from a breach

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of said contract, appellant might be allowed therefor, but none is charged or proven.

Appellant invokes the application of the rule that "He that hath committed iniquity shall not have equity." This is not a case for the application of that rule. Appellee is not here seeking to profit by her own default or breach of contract. Her position is, in effect, that if appellant insists that the contracts are still in force, that he must then perform on his part. He can not successfully contend that by reason of the breach on the part of appellee, he is not bound to perform, but that he may, at the same time, and in a court of equity, insist upon the performance of the contract by her. Appellee is entitled to have said notes and trust deeds canceled and released upon repaying the amount she has received on account thereof, or in default of such cancellation and release, to have paid over to her so much of said loans as she has not received which is still in the hands of appellant. That one or the other of these should be done, is provided by the decree, and appellant is thereby allowed to elect which shall be done.

If appellant elect to procure and return to appellee, duly canceled and released, the notes and trust deeds in said nine loans given, then the sum which should be paid to appellant by appellee should bear interest from the time it was received by appellee until paid. The decree, as entered, does not provide for the payment of such interest, and is in that respect erroneous. If appellant do not elect, as provided in said decree, to procure and return said notes and trust deeds, then appellant should pay to appellee the balance of said loans with interest thereon at the rate fixed in said notes, as provided by said decree.

It is objected by appellant that the court below, after finding that each of said loans is a separate and independent transaction, treats them as a whole, so that the entire sum to be due appellee upon all of them must be paid upon default in the production and cancellation of any of the papers. This objection is not well taken. Appellant says he represents all of the holders of such paper. All of the

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money is in his hands, and has been by him credited to appellee in bulk as one sum.

It seems to us to be unnecessary to remand this cause simply to correct the comparatively small item of interest upon the sum of \$1,067.81 which appellee is decreed to pay to appellant in case the securities be returned to her, as provided by said decree. Appellee may execute and file in this cause in this court within ten days, and for the use of appellant, a stipulation entitled in this cause, promising and providing that in case it shall become the duty, or become the right or privilege of appellee, under said decree, to pay said sum of \$1,067.81, that she will pay therewith interest thereon from the first day of October, 1895 (that being the date of the first of said nine loans), and in default thereof that said decree may be set aside, and in lieu thereof a decree be entered in said cause by said Circuit Court in accordance with the prayer of said cross-bill.

If such stipulation be executed and filed by appellee as above provided, and if a stipulation be executed by said Alfred L. Ward and filed in this court as aforesaid, then an order will be entered affirming the decree of the Circuit Court.

Perceiving no error other than such as will be cured by the stipulations aforesaid, the decree of the Circuit Court will be affirmed upon the filing of such stipulations.

Affirmed.

Henry A. Hoerlein, E. A. Hoerlein, Benjamin A. Hoerlein, The Hoerlein Carpet Cleaning & Upholstering Co. v. Kate E. P. Roberts.

1. **FRAUD—Proper Conclusions.**—The court holds in this case that the findings in the decree are conclusive; that the whole transaction was a fraudulent one from inception to conclusion, as against the complainant, and affirms the decree.

Creditor's Bill.—Trial in the Circuit Court of Cook County; the Hon. EDMUND W. BURKE, Judge, presiding. Decree for complainant; appeal by defendant. Heard in the Branch Appellate Court at the October term, 1898. Affirmed. Opinion filed May 26, 1899.

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FRANK A. MOORE, attorney for appellants.

BULKLEY, GRAY & MORE, attorneys for appellee.

MR. JUSTICE SHEPARD delivered the opinion of the court.

This is a creditor's bill based upon two judgments at law in favor of the appellee against the appellant Henry A. Hoerlein. The specific aim of the bill is to reach and subject to the satisfaction of said judgments, certain property which, shortly before the judgments were recovered, belonged to the judgment debtor, Henry A. Hoerlein.

The bill alleges that Henry A. Hoerlein was, prior to April, 1896, in the carpet cleaning and upholstering business, in his own name; that in the course of conducting said business the indebtedness upon which said judgments were recovered, arose, and that he, with the sole intent of defrauding his creditors, among whom was the appellee, entered into a scheme with his wife and his brother to incorporate the "Hoerlein Carpet Cleaning & Upholstering Company," with a capital stock of \$2,500; that to effectuate such corporation he subscribed for twenty-three shares, his wife for one share and his brother for one share, at \$100 per share, and such corporation was formed, and the business formerly conducted in the name of said Henry A. Hoerlein was thereafter transferred to and carried on in the name of such corporation, but under his management and control, the same as before the formation of said corporation.

The judgments in question were severally recovered in June and July, 1896, upon an indebtedness for rent which began to accrue in December, 1895, under a lease of the premises in which Henry A. Hoerlein conducted his said business.

The corporation was formed in April, 1896, and to it Henry A. Hoerlein, the judgment debtor, transferred by bill of sale all the tangible property and assets previously used by him in said business, and some accounts receivable, in payment of the entire capital stock, except as to \$100, which the brother of the judgment debtor paid in, in money.

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Henry A. Hoerlein was made general manager, his wife was made secretary and treasurer, and his brother Benjamin, a restaurant keeper in another part of the city, who had never been connected with the business, was made president of the corporation.

The next day after the corporation was formed, the twenty-three shares of stock subscribed for and issued to said Henry A. Hoerlein were turned over to his wife and new shares in place thereof issued to her, and one share issued over again to him.

The claim by appellant is, that the stock was transferred to the wife in consideration of a pre-existing *bona fide* indebtedness owing to her by the judgment debtor, Henry A. Hoerlein, her husband.

The decree of the Circuit Court is in conformity to the prayer of the bill, and directs that if the amount of the judgments in question is not paid within five days, the receiver theretofore appointed shall sell the property transferred by the judgment debtor to the corporation, and apply the proceeds, after deducting his just expenses, etc., to paying back to Benjamin A. Hoerlein the \$100 paid for his stock, and then satisfy appellee's judgment, etc.

The case involves no questions of law that are not simple and well understood, if the facts have been properly established.

The only witnesses upon the main question were the judgment debtor, Henry A. Hoerlein, and his wife, E. A. Hoerlein. They were examined at full length by counsel and by the court, and all the facts of the entire transaction were elicited. We have examined their testimony with most careful attention, and entertain no doubt that the trial court reached a just conclusion. The findings in the decree are conclusive that the whole transaction was a fraudulent one from inception to conclusion, as against the appellee, and being sustained by the evidence, we will not disturb the decree. Affirmed.

Laird v. Mantonya.

Fred C. Laird v. Lucius B. Mantonya.

1. **PRESUMPTIONS—That the Finding of Trial Court is Right.**—Where the trial judge sees the witnesses and hears all the evidence, the presumption is that his finding is right, and that, acting under the responsibility of his place, he determined correctly.

2. **CONTRACTS—Between Lessor and Lessee.**—Where a contract is entered into between two parties for a lease of land and a third party takes the place of the lessee, the contract of the original lessee continues in force unless the lessor accepts the assignee as sole tenant and absolves the original lessee. Acceptance of rent by the lessor from the assignee does not discharge the original lessee.

Assumpsit, to recover rent under a written lease. Trial in the Circuit Court of Cook County; the Hon. CHARLES G. NEELY, Judge, presiding. Verdict and judgment for plaintiff: appeal by defendant. Heard in the Branch Appellate Court at the October term, 1898. Affirmed. Opinion filed May 26, 1899.

M. L. THACKABERRY, attorney for appellant.

RICH & LOEHR, attorneys for appellee.

In an appellate court it will be conclusively presumed that the law was correctly applied to the facts by the jury, or the trial court sitting as a jury, unless the record affirmatively shows error in that regard by the submission of instructions or propositions of law. *Belleville Savings Bank v. Bornman*, 124 Ill. 210; *Davies v. Phillips*, 27 Ill. App. 388; *Northwestern Association v. Hall*, 118 Ill. 173; *Montgomery v. Black*, 124 Ill. 62; *Merrimac Paper Co. v. Illinois Trust & Savings Bank*, 129 Ill. 297; *Bank of Michigan City v. Haskell*, 124 Ill. 589; *County of LaSalle v. Milligan*, 143 Ill. 329; *Allison v. Leslie*, 40 Ill. App. 441; *National Bank v. LeMoyné*, 127 Ill. 256.

An assignment of a lease by the lessee does not discharge either the lessee or his surety from its covenants. It does not have this effect even when the lessor recognizes the assignment by accepting rent from the assignee. There must be a clear intent to make a new contract with the assignee and to discharge the lessee, or both will be held.

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Grommes v. St. Paul Trust Co., 147 Ill. 634; Goergen v. Schmidt, 69 Ill. App. 538; Sexton v. Chicago Storage Co., 129 Ill. 334; Field v. Herrick, 101 Ill. 110.

MR. PRESIDING JUSTICE FREEMAN delivered the opinion of the court.

This is a suit by appellee to recover rent under a written lease. The defense is that a power of attorney to confess judgment for rent due under the lease was altered after its execution, and that the lease had been terminated by the substitution of a third party as tenant under a verbal agreement.

Judgment was entered by confession, but subsequently the defendant was allowed to plead, the judgment standing as security. Issue was joined and the case heard before the court without a jury. Judgment was confirmed against appellant for the rent due under the lease.

We regard the alterations in the power of attorney, so far as they are material, as sufficiently explained by the plaintiff's testimony at least to throw the burden upon appellant to show that the lease was not admissible in evidence by reason thereof.

The testimony is conflicting upon some points, but not materially so. The court saw the witnesses and heard all the evidence. The presumption is that the finding is right, and that, acting under the responsibility of his place, the judge determined correctly. Gaynor v. Harding, 76 Ill. App. 660.

We think the finding was correct, inasmuch as the evidence fails to show a clear intent of the appellee to make a new contract with the third party accepting him as a tenant and releasing the appellant. It was a question of fact to be determined from the evidence.

The contract of the original lessee continues in force unless the lessor accepts the assignee as sole tenant and absolves the original lessee. Acceptance of rent by the lessor from the assignee does not discharge the lessee. Grommes et al. v. St. Paul Trust Co., 147 Ill. 634, 648.

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No propositions of law were submitted to the trial court and we must assume that court ruled correctly as to the law. Nat. Bank of Lawrence Co. v. LeMoyné, 127 Ill. 253. The judgment of the Circuit Court is affirmed.

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Crane Company v. Paul J. Stammers.

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1. EVIDENCE—*Admission of Ordinances Not Applicable to the Issues.*—In an action for injuries caused by smoke and cinders emitted by a pipe-mill and its chimneys, the admission of an ordinance of the city in which such mill is located, providing that “cupolas of foundries shall extend at least ten feet above the highest point of any roof within a radius of forty feet and be covered with a wire netting,” where there are no cupolas upon the mill in question, is misleading and calculated to induce the jury to believe that in the erection and maintenance of the chimneys the defendant was violating the ordinance.

2. SAME—*That Others are Annoyed by a Nuisance.*—Testimony tending to show that others were annoyed and injured by smoke and cinders, is competent as tending to prove that the nuisance objected to was capable of inflicting the injury complained of.

3. REMEDIES—*Injuries from Public Nuisances.*—An individual who receives an injury and sustains actual damage from a public nuisance may maintain a private suit for his own special injury, although there may be others affected in other ways by the same nuisance.

4. SAME—*Damages Different from Those Suffered in Common with Others.*—A private action can be maintained by one who suffers a particular and special loss or damage different from that suffered in common with others, from a nuisance. The doctrine now is that a nuisance may be at the same time public and private.

5. PRACTICE—*Power to Limit the Number of Witnesses.*—When a controlling fact is controverted, each party has the right to have all witnesses heard, who have knowledge of facts and circumstances bearing upon the contested point, and to deny such right is error.

Action in Case, for personal injuries. Trial in the Superior Court of Cook County; the Hon. PHILIP STEIN, Judge, presiding. Verdict and judgment for plaintiff; appeal by defendant. Heard in the Branch Appellate Court at the October term, 1898. Reversed and remanded. Opinion filed June 9, 1899.

WING & CHADBOURNE, attorneys for appellant.

BRANDT & HOFFMANN, attorneys for appellee.

MR. PRESIDING JUSTICE FREEMAN delivered the opinion of the court.

This is an action to recover damages for personal injury alleged to have caused the partial destruction of the sight of an eye. Appellee was a motorman employed upon a street railroad in Desplaines street, Chicago. He claims to have received the injury of which he complains while operating his train, on or about the 8th day of February, 1896, when his car was coming down from a viaduct and approaching a pipe-mill operated by appellants. It is claimed that a shower of smoke and hot cinders was driven out of appellant's chimneys, and that he received a speck or cinder in one of his eyes. He testifies that he stopped the car, tried to remove the cinder with his handkerchief, and supposed that he had done so; that a burning sensation, however, continued; that after he got to the end of the route he put a handkerchief over the eye, but continued to work the rest of the day. At night he bathed the injured eye with hot water, kept it bandaged and continued at his work four days, and was then compelled to lay off. He did not consult a physician until about three weeks thereafter, and claims to have been practically unable to see with the injured eye since it was hurt. His testimony is, "I can't see only just a little speck out of it." He testifies that his other eye is in poor condition, also in consequence of the alleged injury.

The declaration contains sixteen counts, to which appellant pleaded the general issue. Briefly stated, the grounds upon which appellee seeks to recover are, that the injury was caused by negligence of the appellant; that the latter was maintaining a public nuisance in the conduct of its business, in consequence of which appellee was injured, and was violating an ordinance of the city of Chicago.

The twelfth count of the declaration charges that the defendant was in possession of the building in question, located in the city of Chicago, where it conducted and operated a foundry, from which a large number of chimneys and "cupolas" projected; that by section 384 of the

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building ordinance of the city it is provided: "Cupolas of foundries should extend at least ten feet above the highest point of any roof within a radius of forty feet of such cupolas, and should be covered on the top with a wire netting;" that said foundry and "cupolas" were maintained as public nuisances, and that it was in consequence thereof that plaintiff was greatly and permanently injured.

It is urged that the court erred in admitting this section of the ordinance in evidence. We think this contention is well founded. The word "cupola," as connected with a foundry, is, according to the testimony, something distinct and different from a chimney, and it is clear from this evidence that there are no "cupolas," in the ordinary meaning of the word, upon the building from which it is claimed sparks emanated, one of which is alleged to have been the cause of appellee's injury. The evidence did not justify the admission of that part of the ordinance which applies to cupolas only. There is no evidence worthy of consideration, tending to show, so far as we can discover, that there were any cupolas at all upon the building in question. The admission of the ordinance was calculated to lead the jury to suppose that in the erection and maintenance of chimneys appellant was violating this ordinance of the city, and thus to prejudice them against the appellant. The objection to its admission should, we think, have been sustained.

It is further contended that the counts of the declaration which allege that the business of the appellant, as conducted, constituted a public nuisance, are defective, in that they fail to aver an injury different in kind from that which might be sustained by the public in general, and that evidence was improperly admitted thereunder.

We see no force in the objection. An individual who receives actual damage from a public nuisance may undoubtedly maintain a private suit for his own special injury, although there may be others affected in other ways by the same general situation. The declaration avers that the appellee did receive special damage, viz., the injury

resulting in the partial destruction of his eye. This is certainly an allegation of an injury differing in kind as well as in degree from that suffered by the public generally. If the appellant was indeed maintaining a structure which injuriously affected the public in the use of the highway where large numbers of people are constantly passing, this might be a public nuisance, if thereby substantial injury was inflicted upon the public at large. A private action can nevertheless be maintained by one who suffers a particular and special loss or damage different from that suffered in common with others thereby affected. "The doctrine now is that a nuisance may be at the same time public and private." *Wylie v. Elwood*, 134 Ill. 281-287.

It is contended that the evidence does not present a case which entitles the appellee to recover.

There is evidence to show that the pipe-mill, so called, by which it is claimed appellee was injured, is situated in the heart of a manufacturing district of Chicago. It is located in the neighborhood of railways, over which large numbers of trains are constantly passing, and over which viaducts are constructed. Freight depots and factories of various kinds are in the immediate vicinity. It is not a residence district. There is evidence that passing railway trains and factories in the vicinity are sources from which smoke and cinders are produced. In order to entitle appellee to recover it is essential that there should be evidence tending to prove, at least with reasonable certainty, that the injury was actually inflicted by appellant. The direct testimony in this respect is far from satisfactory. The "speck," which it is alleged caused the injury to appellee's eye, was so small that it appears never to have been detected. His testimony is that it caused a burning sensation, but he did not see it either before or after it entered his eye. There is, however, other evidence bearing upon the questions of fact, but as the case must be retried we refrain from its discussion.

It is contended that there was no credible evidence tending to show that appellant's pipe-mill, which is said to have caused the injury, was either a public or private nuisance.

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As to this question, whether or not the pipe-mill of the appellant was or was not a nuisance dangerous to the general public, the court, against the objection of counsel on both sides, limited the number of witnesses to "eight on a side." It is urged that in so limiting the number of witnesses for the appellant the court committed reversible error.

The controversy was not one calling for the testimony of experts, it was a question of fact. "If the fact is not controverted, it is no doubt in the discretion of the court to limit the number of witnesses to prove it; but when the truth of the fact is contested it is otherwise." Union Nat. Bank v. Baldenwick, 45 Ill. 375-378.

It is claimed in this case that the injury to appellee's eye was caused solely by the spark emanating from a chimney of appellant's pipe-mill or pipe-foundry, as it is differently denominated. Testimony tending to show that others were annoyed and injured by smoke and cinders which came from that source, was introduced as "tending to prove that the nuisance objected to was capable of inflicting the injury complained of." Such testimony was admissible. (Wylie v. Elwood, 134 Ill. 281, 286.) It was therefore important for appellant to be able to introduce such testimony, and so much of it as might be deemed reasonably necessary to support its contention that no cinders did or could come from its said pipe-mill. If appellant is able to convince the court and jury that the pipe-mill and its chimneys were not capable of inflicting the injury complained of, it may establish a complete defense to the suit. The controversy was therefore upon a controlling fact; and "when a controlling fact is controverted, each party has the right to have all witnesses heard, who have knowledge of facts and circumstances bearing upon the contested point, and to deny the right is error." (Village South Danville v. Jacobs, 42 Ill. App. 533.) In the case at bar, the question is peculiarly one justifying the examination of a number of witnesses. On the one side it was contended that a spark or cinder from the pipe-mill caused the injury. On the other it was claimed that oil was the only fuel used, and that the conditions were such that

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neither sparks nor cinders were produced or expelled from the chimneys. To limit the number of witnesses arbitrarily, without reference to the nature or necessity of their testimony, was to deprive the appellant of the opportunity to make such defense as the law permits. The trial court can not ordinarily determine in advance what witnesses are necessary to maintain the case. The power of the court to limit the number of witnesses is quite fully discussed, and the authorities reviewed by Justice Dibell, in Traders Insurance Co. v. Catlin, 71 Ill. App. 569, and the conclusion is reached that "it is the general rule in this State that a party has a right to call as many witnesses as he sees fit and can produce in support of his contention"—with certain exceptions as to expert and impeaching witnesses and the like.

We regard the general rule as applicable to the case at bar, and are of the opinion that it was error to enforce the limitation in the number of witnesses upon the controversy in question.

The judgment of the Superior Court is reversed and the cause remanded.

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Eliza Dorr et al. v. Amy H. Hunter.

1. **EQUITY PRACTICE—Power to Appoint a Special Master.**—The Circuit Court has power to appoint a special commissioner to make a sale of property decreed to be sold, and to execute the decree in other respects.

Bill to Foreclose a Mortgage.—Error to the Circuit Court of Cook County; the Hon. EDWARD F. DUNNE, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1898. Affirmed. Opinion filed June 9, 1899.

GEO. G. BELLows, attorney for plaintiffs in error.

GEORGE W. WATERMAN and AUGUSTUS S. PEABODY, attorneys for defendant in error.

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MR. JUSTICE SHEPARD delivered the opinion of the court.

The plaintiffs in error elected to stand by their demurrer to a bill by the defendant in error to foreclose a trust deed, in the nature of a mortgage upon real estate, whereupon a decree of sale was entered.

Except as to one point, which will be mentioned hereinafter, the questions presented upon this record are identical with those involved in Rae v. Hempstead Loan and Guaranty Company, 76 Ill. App. 548, affirmed by the Supreme Court, 178 Ill. 369, and we need only refer to those cases for the law upon the main questions here raised—the facts being in every respect substantially the same in both cases.

The excepted point is, that the Circuit Court erred in appointing a special commissioner to make a sale of the property to be sold, and to execute the decree in other respects, and reliance is had upon our statutes relating to masters in chancery, their powers and duties.

The point can not be sustained. Mr. Freeman, in his work on Executions, section 291, in speaking of the authority to make sales under decrees in chancery, says :

“The general vesting by statute in a class of officers of authority to execute a decree seems not to impair the power of the court to appoint a special master to make a sale. The sale is made by the court, and whether the officer deputed to make it is styled a master, commissioner or trustee, he is a mere instrumentality of the court.”

In Farnsworth v. Strasler, 12 Ill. 482, the Supreme Court said :

“We can not say that the Circuit Court erred in appointing a special commissioner or master to carry the decree into execution; although it was business properly appertaining to the duties of the resident master in that county, yet the court was vested with the authority to appoint the special commissioner to execute the decree, and we will presume that this change from the ordinary course was made for sufficient reasons, and the court was not bound to spread those reasons upon the record.”

Again, in Lubliner v. Yeomans, 65 Ill. 305, it is said :

“It is objected that the court appointed a special master

in chancery to execute the decree. It will be presumed such appointment was properly made, the record showing nothing to the contrary."

See also Grubb v. Crane, 4 Scam. 153, and Waugh v. Schlenk, 23 Ill. App. 433.

There seems to be no error in the record, and the decree will be affirmed.

James Cheatle and George G. Newell v. Franklin MacVeagh, Wayne MacVeagh, Rollin A. Keyes and Walter T. Chandler.

1. **FRAUD—When One of Two Innocent Persons Must Suffer.**—When one of two innocent persons must suffer loss by reason of the fraud or deceit of another, the loss should fall upon him by whose act or omission the wrongdoer has been enabled to commit the fraud.

2. **PAYMENT—By a Dishonored Check.**—An attempted payment by a check which is dishonored is no payment at all.

3. **REPLEVIN—Of Goods Obtained under False Representations.**—Where goods are delivered to the possession of another in the expectation that the price will be immediately paid and it is not, the vendors are at liberty to treat the sale as conditional and reclaim the goods.

Replevin.—Trial in the Circuit Court of Cook County; the Hon. JOHN C. GARVER, Judge, presiding. Finding and judgment for plaintiffs; appeal by defendant. Heard in the Branch Appellate Court at the October term, 1898. Affirmed. Opinion filed June 9, 1899.

JAMES HIBBEN, attorney for appellants.

TENNEY, McCONNELL, COFFEEN & HARDING, attorneys for appellees.

MR. PRESIDING JUSTICE FREEMAN delivered the opinion of the court.

Appellees brought suit in replevin. The case was by agreement submitted to the court and a jury waived. Appellants gave to one Parker, claiming to represent a well-known grocery house, an order for sugar at a price below the market. He subsequently notified appellants by tele-

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phone that the house he claimed to represent could not deliver the goods but he would get the sugar from appellees. Appellants were soon after called up on the telephone by appellees' "credit man" and a conversation occurred concerning which there is some difference of opinion but no material conflict. Appellants' version is that the inquiry was if they (appellants) were expecting sugar from appellees, to which the reply was affirmative. Appellees thereupon arranged to deliver the sugar. The invoice was given to Parker, at his request, and the sugar was sent C. O. D. to appellants' place of business. There it was met by Parker, who, representing himself as appellants' agent, had instructed appellees to ask for him when the sugar was delivered. He gave the driver a receipt for the goods, which was signed by him in the name of appellants; and the goods were delivered to the receiving clerk of the latter in the usual way. Appellants, at Parker's request, made out a check, payable to "cash," put their "O. K." upon the back and gave it to Parker, thus putting it in his power to obtain the money. He went out, gave appellees' driver a forged check for the amount payable to appellees, collected the money on the check placed in his hands by appellants, and absconded. Appellees, when the fraud was discovered, reprieved the goods.

Appellants having informed appellees over the telephone that they were expecting sugar from them, can not now claim to be ignorant that the sugar was being sold them by appellees. They took the chances, therefore, when they paid Parker and relied on him to pay appellees for the goods. They must suffer the consequences of their own mistake.

The principle is, as stated in appellants' brief, that when one of two innocent persons must suffer by the fraud of another, the loss should fall upon him who enables such third person to commit the fraud. We regard the undisputed facts in the case as justifying the finding of the trial court. It does not appear that Parker ever obtained possession of the goods. The receipt he gave the driver was

given at appellants' store, signed in their name, and the goods were turned over by the driver to their receiving clerk. Appellants themselves, at their own place of business, treated Parker as their agent. Nothing that had been previously done would have enabled him to consummate the fraud, had they taken the ordinary precaution of asking for the invoice, which would have revealed a discrepancy in price, and put them on their guard; or had they made sure the check was delivered to appellees' driver, or even made it payable to appellees' order. They knew from Parker himself that he was not appellees' agent. They treated him as their own and trusted him wholly to pay for the goods.

The sale was for cash on delivery. An attempted payment by a check which is dishonored is no payment. The terms of the sale were not complied with by the payment of appellants' check to Parker, nor by the delivery of the forged check to appellees. The goods having been put into appellants' possession in the expectation that the price would be immediately paid, appellees were at liberty to treat the sale as conditional and reclaim the goods. Canadian Bank v. McCrea, 106 Ill. 281-298.

Finding no error in the judgment of the Circuit Court it is affirmed.

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Joseph A. Marshall v. The John Grosse Clothing Co.

1. **ESTOPPEL—Former Suit in Bar.**—In order to constitute a bar it must appear that the cause of action and thing sought to be recovered are the same in both suits, so that the former suit concludes both parties and privies, not only as to every ground of recovery or defense actually presented in the action, but also as to every ground which might have been presented.

2. **SAME—When a Former Suit Is Not.**—Where the former suit was for the recovery of installments of rent which matured by the terms of a lease prior to the commencement of the suit, it is not a bar to a suit brought to recover for the installments of rent payable, by the terms of the lease, after the former suit was instituted.

Marshall v. John Grosse Clothing Co.

Assumpsit, for rent. Trial in the Superior Court of Cook County; the Hon. JOHN BARTON PAYNE, Judge, presiding. Verdict and judgment for plaintiff; appeal by defendant. Heard in the Branch Appellate Court at the October term, 1898. Affirmed. Opinion filed June 9, 1899.

STEPHEN G. SWISHER and DENNIS & RIGBY, attorneys for appellant.

JEROME PROBST, attorney for appellee.

MR. JUSTICE HORTON delivered the opinion of the court. In May, 1895, appellee leased to appellant and one J. A. Whipple certain premises in the city of Chicago for the term of three years from June 1, 1895. A written lease was executed by the parties. In August, 1896, appellant and said Whipple vacated the premises. Appellee entered into possession, rented portions and collected rents.

April 20, 1897, appellee commenced suit in the Circuit Court of Cook County to recover the installments of rent then due by the terms of the lease. The declaration stated the particular months for which rent installments were claimed to be due. The pleas of appellant in that case are *non est factum* as to the entire declaration and a separate plea of *nil debet* as to each count. The defendant Whipple made no defense. The entire files and record in the former case are introduced in evidence in this case. Appellant was given but little opportunity for defense in this case in the court below, but we do not see any reversible error in the record.

The two suits are between the same parties upon the same lease contract. They are not for the same cause of action, in that they are for rent installments for different months. In all other respects they are identical except in the pleadings. The points made by appellant as to the merits of this case are that appellant surrendered the premises to appellee, who accepted such surrender; and that appellant was evicted by appellee.

The case of L. N. A. & C. Ry. Co. v. Carson, 169 Ill. 247 (66 Ill. App. 262), is conclusive in the case at bar. That

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was also a second suit upon a lease to recover installments of rent which accrued after the first suit was brought. The court there says (p. 251), that the former suit "concludes both parties and privies, not only as to every ground of recovery or defense actually presented in the action, but also as to every ground which might have been presented."

As we understand this record, including the affidavit of appellant filed in support of his motion for a new trial, the facts are the same as they were at the time of the trial of the first suit. All of the grounds of defense which are here now urged, were or might have been presented at that trial. That case is then an estoppel as to appellant in this case. Roby v. Calumet Dock Co., 165 Ill. 277; N. W. Brewg. Co. v. Hanion, 145 Ill. 182; Riverside Co. v. Townshend, 120 Ill. 9.

The contention of appellant that the former suit is a bar to this suit can not be sustained. To constitute a bar "it must appear that the cause of action and thing sought to be recovered are the same in both suits." But the cause of action, the thing sought to be recovered, is not the same in both suits. In the former case the recovery was for the rent installments which matured by the terms of the lease prior to the commencement of the former suit, April 20, 1897. In the present case it is sought to recover for the installments of rent which matured and became payable, by the terms of the lease, after the former suit was instituted. The cause of action is not the same in the two suits.

As stated in Wright v. Griffey, 147 Ill. 498, "There is a well founded distinction between the effect of the judgment as a bar or estoppel to the prosecution of a second suit for the same cause of action, and its effect as an estoppel where the same question is again brought in issue in another suit between the same parties upon a different cause of action."

It does not appear that the former suit was upon a breach of contract, as contended by appellant. That suit is not a bar to this suit, but appellant is thereby estopped from

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making any defense in this suit which was or which might have been presented in that suit. But any defense might have been made which has arisen or become effective since that suit was instituted. No such defense was interposed.

The judgment of the Superior Court must be affirmed.

Marian Hooper v. Mary Dawson McCaffery and The Illinois T. and Sav. Bk., Executor and Trustee.

1. **MARRIAGE—Consent of the Parties.**—A valid marriage can not exist without the consent of the parties and an assumption of the marriage status. Words or actions indicative of consent by both contracting parties must exist in order to constitute the simplest kind of marriage.

2. **SAME—Subsequent Copula Will Not Supply the Lack of Consent.**—Subsequent copula will give character to words used or acts done, that in themselves are uncertain in indicating the intention of the parties to then and there marry, but will not supply a lack of consent.

3. **SAME—When it will be Presumed.**—A marriage will be presumed to exist between parties whose cohabitation is apparently matrimonial, especially where their declarations to the world are consistent with the marriage relation, and their reputation is that of being married.

4. **SAME—Counter Presumptions.**—In case of irreconcilable presumptions, both for and against marriage, one presumption will stand against the other and both will be nullified; hence, proof superior to, and which will overcome a mere presumption must be resorted to by whoever has the affirmative of the question.

5. **SAME—Living Together as Husband and Wife—When to be Held Matrimonial.**—However well it may be understood by others, that persons living together as man and wife are such, yet unless it be so understood and consented to by the parties themselves, the marriage relation between them does not exist. Sexual relationship, when in fact meretricious, and so understood by the parties, ought, in consideration for the safety of society and the repose of property, not to be held to be matrimonial.

Petition, for widow's award. Trial in the Circuit Court of Cook County on appeal from the Probate Court; the Hon. EDWARD F. DUNNE, Judge, presiding. Decree for petitioner; appeal by respondents. Heard in the Branch Appellate Court at the October term, 1898. Reversed and remanded with directions. Opinion filed May 26, 1899.

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EDWIN WALKER, EDWIN J. FARBER and PILLSBURY & ADAMS, attorneys for plaintiff in error.

Marriage will sometimes be presumed from cohabitation. But this presumption may be overcome, as cohabitation may be, and frequently is, meretricious as well as matrimonial. Laurence v. Laurence, 164 Ill. 367, 374; Myatt v. Myatt, 44 Ill. 473; Port v. Port, 70 Ill. 484; Appeal of Reading Co., 113 Pa. St. 204.

The cohabitation of two people apparently as man and wife, their reputation of being married and their declaration consistent with that relation, are nowhere held to constitute marriage; they are at most presumptive evidence of marriage. Cartwright v. McGown, 121 Ill. 388; Letters v. Cady, 10 Cal. 533; Randlett v. Rice, 141 Mass. 385; Williams v. Williams, 46 Wis. 464.

If two people live together in apparently matrimonial cohabitation, treat each other as husband and wife and acquire the reputation of being married, yet if either of them subsequently sustains similar relations with a third person, no presumption of marriage can arise from the former cohabitation and reputation, but any one asserting such a marriage must prove its actual occurrence. Bishop on Marriage and Divorce (5th Ed.), Secs. 440 and 444; Bishop on Marriage, Divorce and Separation, Vol. 1, Sec. 1034; Hiler v. People, 156 Ill. 511; George v. Thomas, 10 Up. Can. (Q. B.) 604; Jones v. Jones, 45 Md. 144, 48 Md. 391; Cartwright v. McGown, 121 Ill. 388, 406; Jackson v. Claw, 18 Johns. 345.

If two people live together in apparently matrimonial cohabitation, treat each other as husband and wife and acquire the reputation of being married, yet if either of them subsequently actually marries a third person, no presumption of marriage can arise from such cohabitation and reputation. Jones v. Jones, 45 Md. 144; Jones v. Jones, 48 Md. 391; Breakey v. Breakey, 2 Up. Can. (Q. B.) 349; Lawson on Presumptive Evidence, 447, Rule 95; Clayton v. Wardell, 5 Barb. 214, 4 N. Y. (4 Com.) 230; Taylor v. Taylor (1 Lee, 454), Eng. Eccles. Rep. 454; Case v. Case, 17

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Cal. 598; Weatherford v. Weatherford, 20 Ala. 548; Chamberlain v. Chamberlain, 71 N. Y. 423; Poultney v. Fair Haven, Bray. (Vt.) 185; Myatt v. Myatt, 44 Ill. 473.

Cohabitation arising from a void marriage, or otherwise illicitly begun, is presumed to continue illicit, and affords no evidence of marriage. Cunningham v. Cunningham, 2 Dow (House of Lords), 482; Lapsley v. Grierson, 1 H. L. C. 498; Barnum v. Barnum, 42 Md. 251; Williams v. Williams, 46 Wis. 464; Brinkley v. Brinkley, 50 N. Y. 184; Hebblethwaite v. Hepworth, 98 Ill. 126; Cartwright v. McGown, 121 Ill. 388.

E. H. GARY, H. L. BOND, JR., and C. F. T. BEALE, attorneys for defendant in error.

The declaration of a deceased husband or wife as to his or her marriage is competent, and, perhaps, almost conclusive, evidence to prove such marriage. Caujolle v. Ferrie, 23 N. Y. 104; In re Taylor, 9 Paige (N. Y.), 617; Greenwalt v. McEnelly, 85 Pa. St. 352; State v. McDonald, 25 Mo. 176; Commonwealth v. Holt, 121 Mass. 61; Bishop on Marriage, Separation and Divorce (Ed. 1891), Sec. 1058.

The declaration of a decedent of his marriage, made to his attorney, is competent evidence of such marriage. Such declaration is not a privileged communication when the client does not object to such evidence or impliedly waives the privilege; or where the inquiry is simply to ascertain, as between legatees and grantees, as to the intention of a deceased person in respect to the disposition of his estate. Scott v. Harris, 113 Ill. 454, and citation; Blackburn v. Crawfords, 3 Wall. (U. S.) 194; 1 Wharton on Evidence, Sec. 591; 1 Taylor on Evidence, Sec. 928; Russell v. Jackson, 9 Hare (Eng.), 387.

The testimony of relatives of a deceased person as to the marriage of the latter, and the general repute in the family in relation thereto, or of tacit recognition of marriage relation, is competent and primary evidence of such marriage. 1 Taylor on Evidence, Sec. 635–644; Greenleaf on Evidence, Sec. 103; Cuddy v. Brown, 78 Ill. 415; Gaines v. New

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Orleans, 6 Wall. (U. S.) 642; Harland v. Eastman, 107 Ill. 538.

Evidence of repute and general reputation, living together as man and wife, holding each other out to the world as man and wife, is competent evidence of marriage. Caujolle v. Ferrie, 23 N. Y. 104; Port v. Port, 70 Ill. 485, 486; Cartwright v. McGown, 121 Ill. 398; Miller v. White, 80 Ill. 585.

Where a marriage has been shown and subsequent marriage proved, although a presumption of divorce or dissolution of the first marriage may be raised, still plenary proof is not essential to establish the contrary, and slight negative proof will overcome the presumption of divorce. Schmisseur v. Beatrice, 147 Ill. 217; Cole v. Cole, 153 Ill. 587.

Where a husband abandons his wife, or drives her from him, he is not allowed to take advantage of his acts, nor does the wife, in such case, forfeit any of her rights by subsequent wrongdoing. Gordon v. Dickison, 131 Ill. 141, and citations.

A recognized child is presumed to be legitimate, and the result of a lawful marriage. Those who question the marriage must establish the claim by irrefragible proof. Such a presumption is negatived only by disproving every reasonable possibility. Orthwein v. Thomas et al., 127 Ill. 554; Jones et al. v. Gilbert, 135 Ill. 27; Caujolle v. Ferrie, 23 N. Y. 91.

MR. JUSTICE SHEPARD delivered the opinion of the court.

John McCaffery, for many years a resident of this county, died in June, 1894, leaving a last will, disposing of a large estate, dated August 29, 1892, and a codicil thereto, dated January 6, 1894, upon which probate was made, June 14, 1894, in the Probate Court of Cook County.

Said will and codicil (duly witnessed) were as follows:

"I, John McCaffery, of the city of Chicago, in the county of Cook and State of Illinois, being of sound mind and memory, do make, ordain and establish this to be my last will and testament, hereby revoking all other wills by me heretofore made.

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First. It is my will that all my just debts and funeral expenses shall be fully paid.

Second. I hereby constitute and appoint the Illinois Trust and Savings Bank, a corporation doing business in Chicago aforesaid, to be executor and trustee of this my last will and testament.

Third. I hereby give, devise and bequeath to said Illinois Trust and Savings Bank aforesaid all of my estate, whether real, personal or mixed, in trust, to settle, collect, loan, invest, sell, convey by deed, improve, lease, save, accumulate, control and manage the same, in its discretion, for the best interest of my estate, and out of the income thereof to pay to my daughter, Mrs. Mary Ann Baker, the wife of Winfield S. Baker, the sum of three thousand (\$3,000) dollars per annum, payable quarterly during her natural life, and if she shall have legitimate issue of her body, which shall survive her, then to continue to pay to such child or children, share and share alike, the sum of three thousand (\$3,000) dollars per annum, payable quarterly from the time of my said daughter's decease until the youngest of said child or children shall come of lawful age, when said annuity shall cease. Whereupon said trustee shall pay to said child or children the sum of forty thousand (\$40,000) dollars out of my estate, to be divided share and share alike. Said trustee shall also pay out of the income of my estate to the guardian hereinafter named, of my son, John C. McCaffery, for his use, education and support, such sum of money from time to time as may be required by said guardian, not exceeding two thousand (\$2,000) dollars per annum, until he arrives at the age of twenty-one (21) years, whereupon said trustee shall pay to my said son, John C. McCaffery, the sum of forty thousand (\$40,000) dollars out of my estate upon his arriving of lawful age; in addition to the foregoing annuity and bequest provided for my said son, John C. McCaffery, said trustee shall allow him the free use and occupation of the homestead now occupied by me, together with all the household goods, furniture and fixtures therein during his minority for his home, and upon his arriving of lawful age said homestead, household goods, furniture and fixtures shall become his property, in addition to said forty thousand (\$40,000) dollars; my said son, John C. McCaffery, is now living with me.

Said trustee shall also pay to my sister, Ann Brown, of the city of Chicago, the sum of one hundred (\$100) dollars per annum during her natural life, payable quarterly.

Said trustee shall also pay to my friend, Thomas Kelly,

the sum of five thousand (\$5,000) dollars, which sum I hereby give to him for his many kindnesses to me.

At the expiration of five (5) years from my death, said trustee shall divide so much of my estate as is not needed to pay the legacies and annuities and to carry out the terms of this will, among my lawful heirs then living, in such proportions as they would be entitled to by law as such heirs if this will were not made, provided that the child or children, nor the descendants of any such child or children of my daughter, Mary Ann Baker, nor of my sister, Ann Brown, nor said Mary Ann Baker, nor said Ann Brown, shall receive no part nor portions of my estate at such or any subsequent division thereof, aside from the annuities and legacies hereinbefore provided for them, but in determining who my lawful heirs are at such or any subsequent division of my estate, they, and each of them, shall be omitted from the list of my lawful heirs, and the said division shall be determined the same as though they never existed.

After the payment of all the legacies and after the termination of all the annuities above provided for, my trustee shall divide the balance of my estate among the same persons, or their heirs, as are permitted to participate in the first division. In making said divisions of my estate said trustee may convert my estate into money, or apportion it in kind, as my trustee may deem best.

It is my will that said executor and trustee shall have full power to sell and convey all of my real estate wherever situated, or any part thereof, at such time or times and on such terms and conditions as said trustee may deem proper.

It is my will that said trustee shall, at the expense of my estate, keep in repair and maintain the vault or mausoleum which I have lately constructed at Mount Greenwood Cemetery, in Cook county, Illinois, until the final division of my estate.

It is my will that my friend, John J. Mitchell, shall be the guardian of both the person and estate of my son, John C. McCaffery.

It is my wish that said trustee shall employ Clayton E. Crafts, who has been my attorney for several years, as the legal adviser in all matters pertaining to the settlement of my estate, and in hunting up my lawful heirs, as he is familiar therewith.

In witness whereof, I, the said John McCaffery, have hereunto set my hand and seal this 29th day of August, A. D. 1892.

JOHN McCAFFERY. (SEAL.)

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I, John McCaffery, having heretofore made my last will and testament, dated the 29th day of August, A. D. 1892, do hereby reaffirm said last will and testament in all things, and do also make, publish and declare this codicil to said last will and testament, viz.:

I do hereby declare that I had five (5) children by my first wife, whose maiden name was Dawson, being a son named William McCaffery, a daughter named Nancy McCaffery, and three (3) other daughters, whose names I do not now remember. That I had two (2) children by my second wife, whose maiden name was Douglas, being a son named Henry N. Douglas McCaffery, and a daughter whose name I do not now remember. These seven (7) children are in addition to those specifically named in said last will and testament, to which this is a codicil.

Witness my hand and seal this sixth day of January, A. D. 1894.

JOHN McCAFFERY. (SEAL.)"

About a year after the grant of probate and letters testamentary, the defendant in error appeared in the Probate Court, and, claiming to be the widow of McCaffery, petitioned for her award as widow, her dower, and one-third of the personality, and for distribution to her of a portion of the estate, there being, as alleged, abundant assets.

To such petition, the plaintiff in error, claiming to be the daughter of McCaffery, and one of his devisees, alone answered, denying all the alleged rights of the defendant in error, and charging that if the defendant in error were McCaffery's widow she had forfeited all claims to any part of his estate because, as charged, she voluntarily abandoned him in 1848, and lived with one William O'Daniels as his wife, from July, 1848, until his death in 1864, and thereafter claimed to be O'Daniels' lawful widow.

Upon a coming on of said petition and answer to be heard by the Probate Court, it was found that "said Mary Dawson McCaffery is the widow of said decedent, and is entitled to distribution," etc., and ordered that the executor pay her \$10,000 within ten days, taking a refunding bond back. From that order an appeal was taken by the plaintiff in error to the Circuit Court, and a trial *de novo* was there had. Upon the trial in the Circuit Court, an issue of fact as to

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whether the defendant in error was the lawful wife of McCaffery at the time of his death was submitted to the jury, and they returned a verdict that she was such lawful wife. There were also submitted to the jury certain special interrogatories, which, with the answers by the jury, were as follows:

"1. Did the petitioner and one William O'Daniels live together as man and wife for a period of thirteen years or more after the separation of the petitioner and the testator, John McCaffery ? Yes.

2. Was an actual marriage ever celebrated between petitioner and one William O'Daniels ? No.

3. Did the testator, John McCaffery, and one Marian Douglas Graham live together as man and wife and acquire a reputation of being married subsequent to the separation of the petitioner and said John McCaffery ? No.

4. Was an actual marriage ceremony ever celebrated between the testator, John McCaffery, and one Nancy Ganoe or Knode ? Yes.

5. Did the petitioner apply for and draw a pension from the United States government for a period of twenty-five years or more as the widow of one William O'Daniels ? Yes.

6. Do you find that the testator, John McCaffery, and the petitioner ever cohabited or communicated with each other ? Yes. Or had any knowledge of the residence of each other from and after their separation in or about 1848, to the date of the death of said John McCaffery in the year 1894 ? No."

Thereafter, the Circuit Court entered its judgment or decree, finding as was found by the Probate Court, that the defendant in error was the lawful wife of McCaffery, and approving and redirecting the order of distribution to defendant in error, as made by the Probate Court.

This appeal is from that decree of the Circuit Court.

The main issue involved, is as to whether or not the defendant in error, Mary Dawson McCaffery, is the lawful widow of said John McCaffery, or, in other words, was she his lawful wife at the time of his death.

Under the evidence, and apparently without present serious contention to the contrary, she is the same woman who is referred to in the codicil as "my first wife, whose maiden

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name was Dawson;” so, also, is the plaintiff in error the daughter of the same woman referred to in the codicil as “my second wife, whose maiden name was Douglas.”

The relations, upon their face matrimonial, between McCaffery and the defendant in error, his “first wife,” were begun in the old country about 1835, and there and in Michigan and New York State, lasted until the summer of 1848, when they absolutely ceased in New York City, and from thenceforward, until after McCaffery’s death, neither one of them appears to have had any knowledge of the existence of the other. The relations between McCaffery and his “second wife”—the mother of plaintiff in error—were begun about the time of (perhaps before) his separation from his “first wife,” and were, during most, if not all, of the time after the separation from defendant in error, likewise matrimonial upon their face. They certainly lived together as man and wife, and were reputed to be such, from the time they took up their residence in Alexandria, Virginia (which was soon after the separation), until her death at that place in January, 1851. A child or children were born to them, and in all other respects, while living in Alexandria, they appeared and were reputed to be man and wife. There is scarcely any evidence, except by way of inference, in the record to sustain the “third” special finding of the jury. On the other hand, the evidence is overwhelmingly opposed to it.

After the death of this “second wife,” McCaffery actually married, by due ceremony, in the spring of 1852, at Hancock, Maryland, an old maid, “sixty odd years of age” (supposed to have money, which McCaffery seems not to have got), named Nancy Ganoe, with whom he lived but a very short time. One witness testified that he left on his canal boat the day after the marriage and never returned. She died about two years later, and there was no child of that marriage.

From the time when, in the spring or summer of 1852, McCaffery disappeared from the line of the Chesapeake and Ohio canal, no trace of him or his whereabouts seems

to exist in the records of this suit, until he is shown to be living in this county, prior to 1860, with a fourth "wife," Ann McKeon, or Ann McKeon McCaffery, with whom he continuously lived until her death, which occurred some five years before he died. By this last wife, his daughter, Mrs. Baker, specifically named in his will, was born. The son, John C., also specifically named in his will, is stated to be an adopted son.

From all such appearances as are ordinarily visible to the world, and by repute among their neighbors and acquaintances, McCaffery and each one of these four women during the time of their respective relationships with him, lived together as husband and wife, unless it may be that his "second wife" was the same woman that was on the boat with him in New York prior to his separation from his "first wife." By each of them, except Nancy Ganoe, he had children. One of the three children, born in Ireland, by the "first wife," defendant in error, a daughter, was left with her maternal grandmother when defendant in error came to this country to join McCaffery, about two years after he came. The other two were brought to America by the mother. Other children were born to him in this country by the "first wife," and they, together with the two brought from Ireland, were kept by McCaffery when he and his "first wife" separated. By his codicil he makes express reference to five of them. However many there were of them, they were all taken by him to Virginia and Maryland, when, shortly after he and his "first wife" separated, he went there to operate upon the Dismal Swamp and Chesapeake and Ohio Canals, and she testifies she never saw or heard of them afterward, until, at least, after his death, some forty-five years later.

The next certain identification of McCaffery, after separating from his first wife, in 1848, is in January, 1850, on the Dismal Swamp canal, bound for Norfolk, Virginia, and when he was living with his "second wife" in Alexandria, Virginia, in the apparent and reputed relationship of man and wife. By her, he certainly had the two children referred to

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in his codicil, of whom the plaintiff in error is the daughter whose name he could not remember.

When, later, he disappeared from the line of the Chesapeake and Ohio canal, in 1852, shortly after marrying Nancy Ganoe, he left behind him not only his wife, Nancy, but all his living children by his two earlier wives.

In the later years of his lifetime, McCaffery made an incomplete search, through his attorney, to learn something of his abandoned children, but gave up the attempt, after partial success, and seems to have contented himself by providing in his will that his "lawful heirs" should be hunted up after his death.

Many, if not all these matters connected with McCaffery's life, are material in determining the issue involved upon this record, of whether or not defendant in error was his wife at the time of his death in 1894.

We should now briefly recur to the defendant in error and her career after separating from McCaffery, and we will speak only of what she has testified to in that respect. Their home had been for some years at Corning, New York, but McCaffery was much away on the canals. By his direction, she sold out what things they had in Corning, and with the children went to New York City on a canal boat. A quarrel there arising between McCaffery and her, he beat her, and put her ashore with her baggage, and shoved off the boat so she could not return on board. While sitting on the dock she was approached by two men, and was persuaded to accompany William O'Daniels, who seems to have worked for McCaffery on one of his canal boats, back to Geneva, on Seneca Lake—her object being to get back to Corning. Finding no boat at Geneva bound for Corning, O'Daniels left her at Geneva and went up the lake to his home. Returning, after one or two days, he represented to her that he had told his mother he was married to her, and that she might go home with him, and she went and stayed there until the next spring. It may be that the inference to be drawn from her testimony is that no improper relations existed between herself and O'Dan-

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iels until spring, although he was persistent in endeavoring to obtain her consent to marry him. When spring came, however, she began to live with him openly as his wife, and their relations, as such, continued thereafter until he died a prisoner at war, at Andersonville, October 18, 1864. She then applied for and obtained a pension as O'Daniels' widow, in 1865, and drew it ever afterward until January, 1895. She was never married to O'Daniels, because, as she testifies, she "did not know whether I (she) was or was not the wife of John McCaffery," but was "always known as his (O'Daniels') wife and respected as such."

In connection with her testimony concerning the obtaining of her pension as the widow of O'Daniels, she testified that she supposed McCaffery was dead before the war; and in answer to a question as to why she did not marry O'Daniels after coming to the belief that McCaffery was dead, she said :

"I didn't want to; we lived just as happily and true and loyal with each other as though we had had a hundred ceremonies performed."

But nevertheless she did, in three affidavits made by her thirty years before she testified, for securing her pension, swear specifically that she was married to O'Daniels, and gave the name of the clergyman who performed the ceremony and the date and place of its performance. In the last one of such affidavits she is particular to specify the age of the clergyman as over seventy, his subsequent death, his absence when performing the ceremony, from the State where he resided, and that because thereof no public record of the marriage was made, and the further fact that witnesses who were present at the marriage had gone to Canada and no trace of them could be found. And it seems that upon each of the many occasions when she subsequently received her pension, she made affidavit that she was the widow of O'Daniels.

Aside from the circumstances we have mentioned which give rise to presumptions both in favor of and against the relationship of husband and wife existing between Mc-

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Caffery and the defendant in error, there is evidence which it is claimed tends to show that an actual contract of marriage was entered into between them in the old country.

Laying aside all questions of the competency of such evidence, it consisted wholly in the testimony of Mr. Crafts, the attorney who drew McCaffery's will, and the testimony of the defendant in error. The testimony of Mr. Crafts was to the effect that McCaffery told him he married Mary Dawson, or Ann Dawson, in "England or Scotland, somewhere in the old country, anyway, * * * about a year or two prior to the crowning of Queen Victoria, something prior to 1837." The same witness also testified that McCaffery told him he was subsequently married to another woman, who was a widow, and we understand there is no dispute that the two women so referred to are respectively the defendant in error, and the mother of the plaintiff in error. It appears, also, from the testimony of Mr. Crafts, that he could not get any other information from McCaffery concerning his first wife, although he tried to do so.

Whatever weight the declarations of McCaffery in his codicil, or to Mr. Crafts, may be entitled to concerning the fact of his marriage to his "first wife," the defendant in error, exists and attaches with equal force to a marriage by him with his "second wife," the mother of plaintiff in error. He gave to Crafts substantially as much information concerning one woman as the other.

As to Mr. Crafts' testimony, assuming it to be competent evidence, it establishes nothing more conclusive upon the fact of an actual marriage, contracted with either woman, than is afforded by the statement in McCaffery's codicil concerning them, or by his continued holding out of them as his wives during the years that he lived with them respectively. In other words, it is merely cumulative evidence upon that point. It seems plain from the whole record that McCaffery's purpose in making his statements to Crafts, and by incorporating into his codicil the names of his "first" and "second" wives, was not so much, if at all, to declare and establish the fact of his marriage to either of

them, as to aid in identifying who his children were that should be the objects of his bounty. When questioned by Crafts about his first wife, McCaffery refused to give information. He had previously told his first wife's sister that she was dead. He also told his own sister that she left him and went away with somebody else. He seems also to have told Mr. Crafts that he did not want anything to do with her or her relatives, and the search that was made for his children in his lifetime was by him specifically directed to finding them, and not her.

We repeat, it seems plain that McCaffery did not intend by any declaration in his codicil or to his attorney, to represent that he ever actually entered into a marriage contract with the defendant in error, although he was interested in recognizing and claiming the children born to him by her. And we regard the record as devoid of evidence, by or through McCaffery, that there was ever a marriage contract between himself and defendant in error.

Now, as to evidence afforded by the testimony of the defendant in error, of an actual marriage ever having been celebrated between her and McCaffery. It is her testimony alone that furnishes any evidence upon the subject.

At the hearing in the Circuit Court it was admitted by counsel for defendant in error, *ipsissimis verbis*: "We do not claim that there was any legal marriage in England." And again: "There is no record of any legal marriage in England."

And, indeed, we may add it is not claimed that any record evidence of a marriage between the two anywhere exists. Whatever marriage in fact, as distinguished from marriage by presumption, was ever had between the two occurred at Gretna Green, Scotland. The only evidence upon that subject is by the defendant in error, and as shown by the abstract, is as follows:

"I was fifteen years old when I was married. * * * I lived there (in Carlisle, England) until I was married. I married John McCaffery; he was born in County Down, Ireland. I had known him about a year, and was married to him twice; first at Gretna Green, Scotland, without my

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mother's consent. We drove from Carlisle. It took but a few hours to get there. A man named James Kelly was present. My mother was dissatisfied with the Gretna Green marriage, and insisted we should be married in the Episcopal church, but we were married in a Presbyterian church at Carlisle. * * * This was about three weeks after the first marriage, and I lived with McCaffery as his wife in the meantime."

If this last marriage, in a Presbyterian church, were ever performed, no church record in Carlisle shows it, and, as above, it is admitted that there was no legal marriage had in England. The inferences are very strong that no marriage between them took place in any church.

It will be observed that defendant in error is absolutely silent as to what took place in Gretna Green, from which she draws the conclusion that she and McCaffery were "married" there. There is nothing to show that McCaffery, by word or act, consented to marry her—and indeed, it is only by inference that we may conclude he was present with her in Gretna Green. The record, upon that point, is even less explicit than the abstract. Testifying here in a case involving a large property to her, and aided by astute counsel, she nowhere says McCaffery ever promised or consented by words or act to take her as his wife, or be married to her, or states any word or act of his to such effect.

There was plainly no ceremony performed. Kelly was the only third person present. Under the title "Gretna Green," Bouvier (Law Dict., Ed. 1897) says:

"By the law of Scotland nothing was required to constitute a marriage but the mutual declaration of the parties in the presence of witnesses—a ceremony which could be performed instantly—and it was immaterial whether or not the parties were minors."

There is no sufficient proof in this record that even so irregular a marriage as the Scottish law permitted was had. All evidence of a "mutual declaration of the parties" is lacking. To say, as defendant in error does, that she was "married to him," McCaffery, is but the statement of a conclusion either of law or of fact or both. Something more is needed under either the Scottish or the common law, to

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constitute a marriage. Such a thing as a valid marriage can not exist without the consent of the parties and an assumption of the marriage status. Words or actions indicative of consent by both contracting parties to marriage then and there, must exist in order to constitute the simplest of marriages. Subsequent copula by the parties will give character to words used or acts done, that in themselves are uncertain in indicating the intention of the parties to then and there marry, but will not supply all lack of their existence.

It is not necessary to deny to the defendant in error her belief that she was married at Gretna Green, but such belief by her does not supply the lack of all evidence that McCaffery assented to the contract. His subsequent conduct does not inspire our minds with the reflection that he was too honorable to live and cohabit with her irrespective of marriage bonds; and we know of no law, recognized by our system of jurisprudence, that will permit us to hold that he entered into a marriage contract with defendant in error at Gretna Green, when, as here, there is absolutely no proof that he did so.

The case of the defendant in error must therefore fall back upon the phase of the law which will presume the state of marriage to have existed between herself and McCaffery because of their long cohabitation, etc. And here we are instantly met with the counter presumption arising from both her own and McCaffery's conduct subsequent to their separation in 1848, as already set forth.

A marriage will be presumed to exist between parties whose cohabitation is apparently matrimonial, especially where their declarations to the world are consistent with the marriage relation, and their reputation is that of being married.

But in this case there is just as much presumption of marriage between defendant in error and O'Daniels, and between McCaffery and the mother of the plaintiff in error, and between McCaffery and Ann McKeon, as ever existed between the defendant in error and McCaffery, and these

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presumptions are absolutely inconsistent with each other. So, also, is the marriage ceremony that was performed between McCaffery and Nancy Ganoe absolutely inconsistent with his innocence if he were ever previously married in fact to the defendant in error and not divorced from her.

Bishop, in his work on Marriage, Divorce and Separation, Vol. 1, Sec. 1034, says of the necessity of evidence of a marriage in fact, in such a case:

“When in any issue of marriage or no marriage, the presumed innocence of a proven cohabitation is overcome or essentially weakened by the counter presumption of the innocence of some other act or transaction appearing in the case, there must be further evidence of the marriage—in other words a marriage in fact must be shown, or the proofs will be inadequate.”

That is but to say, that in case of irreconcilable presumptions of both marriage and no marriage, one presumption will stand against the other and both will be nullified; hence, proof superior to, and that will overcome, mere presumption, must be resorted to, by whoever has the affirmative of the case.

The affirmative of the issue in this case, of showing that she was McCaffery’s wife at the time he died, was upon the defendant in error, and if sustained, it has been because of the presumption of law arising from her relations with McCaffery, not from actual marriage to him, as distinguished from a presumptive marriage.

Now, omitting all consideration of her relations with O’Daniels and the marriage she swore to having celebrated with him, her presumptive marriage with McCaffery is met and nullified by the equally strong presumptions in favor of McCaffery’s innocence in his subsequent presumed marriages to the mother of plaintiff in error, and to Ann McKeon, and by fact of his actual marriage to Nancy Ganoe.

If defendant in error had succeeded in establishing the fact of her marriage to McCaffery at Gretna Green, she would have clearly overcome all presumptions in favor of the validity of McCaffery’s subsequent marriages, both presumptive and in fact, unless for a further presumption that

he procured a divorce from her after their separation, which last presumption was anticipated by the defendant in error, and perhaps overcome.

The Gretna Green marriage not being established, we see no standing in court left for the defendant in error. All presumptions of law in her favor are destroyed by the presumptions of McCaffery's innocence in the matter of his other subsequent marriages, presumed and actual.

Aside from presumptions of law, there appear in the record some facts, beyond those that have been mentioned, that oppose the theory of defendant in error that she was the lawful wife of McCaffery when they separated.

At the time of their separation, McCaffery denied to her, as she testifies, the privilege of remaining on the boat with him, and also the custody of any one of their numerous children, some of whom were quite young—she speaks of one as a baby. McCaffery was not at that time the wealthy and powerful man he subsequently became, but on the contrary he appears to have been poor—so much so that he subsequently lost his two canal boats to creditors. It would not seem that she need to have feared to legally assert herself against him, if she believed she possessed any rights as a lawful wife. She knew where McCaffery was bound for with his boats, and yet she testifies she never afterward inquired for or heard of him or the children—not even the one she left in Ireland—until after his death. It is difficult to believe she would forego all her legal rights, and suppress all the natural affections and instincts of a mother, and take up an adulterous connection, if she had then believed herself to be a lawful wife and mother.

However well it may be understood by others, that persons living together as man and wife are such, yet unless it be so understood and consented to by the parties themselves, the marriage relation between them does not and ought not to exist. Sexual relationship, when in fact meretricious, and so understood by the parties, ought, in consideration for the safety of society and the repose of property, not to be held to be matrimonial.

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To hold this defendant in error to have been the lawful wife of McCaffery when he died, upon the facts disclosed by this record, is to not only violate the law, but also to set a high premium upon immorality and venality.

The peace of the family, the orderly transmission of property and the good of all society, demands that courts should be vigilant in affording all the protection which the law gives against attacks of this character, except where clear rights are made to appear.

We have avoided all secondary considerations in order to reach the main issue of fact involved in the case, and have given to the defendant in error the benefit of all questions concerning the competency of evidence. Upon the facts alone, considering everything shown by defendant in error, whether competent evidence or not, the petition of defendant in error to be declared to be the lawful widow of McCaffery, and to be entitled to share in his estate, ought not to prevail. The verdict of the jury and the findings of the Circuit Court were manifestly against both the law and the evidence, and must be set aside.

The judgment here is, that the decree or judgment of the Circuit Court be reversed and the cause remanded with directions to that court to dismiss the petition of the defendant in error.

Reversed and remanded with directions to dismiss the petition.

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1. FORMER RECOVERY—*When it is a Bar.*—Where an employe under a contract, having ceased to work before its expiration, brought a suit upon such contract and recovered a judgment, which was afterward paid by the defendant, *it was held* that this judgment was necessarily either for wages which he would have earned under the contract had he not been discharged, but which by reason of his discharge he did not earn, or for a breach of the contract and damages consequent thereto; but the gist of such action not being for wages actually

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earned, but merely the breach of the contract, that such former recovery was a bar to a subsequent action for wages or for a breach of the contract.

2. CONSTRUCTIVE SERVICES—*Discussion of the Doctrine.*—The court reviews the history and discusses the doctrine of constructive services, and is of the opinion that the Supreme Court has not adopted the doctrine.

Assumpsit, on a contract of employment. Trial in the Circuit Court of Cook County, on appeal from a justice of the peace; the Hon. ELBRIDGE HANEY, Judge, presiding. Verdict and judgment for plaintiff; appeal by defendant. Heard in this court at the October term, 1898. Reversed. Opinion filed June 12, 1899.

Statement.—This suit was brought upon a written contract. The contract was one of employment, by which appellant undertook to employ appellee as a foreman in its manufactory, for a period of three years from February 12, 1896, and at the rate of \$5 per diem. Appellee worked under the contract until December 28, 1897. At the latter date he ceased to work, and whether he was wrongfully discharged or quit of his own motion, was a matter of dispute, and the evidence upon the trial was in that regard conflicting. The evidence was, however, sufficient to sustain the theory of appellee, viz., that he was improperly discharged, and that there was a breach of the contract by appellant.

A former and other suit was brought by appellee against appellant on January 22, 1898, upon the same contract, or for breach of it, before a justice of the peace, and a judgment rendered in that suit upon January 29, 1898, was afterward paid by appellant and satisfied. This former judgment was urged upon the trial as a bar to this suit. This suit also was begun before a justice of the peace, and was heard in the Circuit Court upon an appeal from the judgment of the justice of the peace. The evidence established conclusively that the former judgment recovered in the other suit was either for wages which appellee would have earned under the contract had he not been discharged, but which by reason of the discharge he did not earn, or for a breach of the contract and damages consequent thereto. The period of

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time after the discharge of appellee covered by the judgment obtained in the other suit was from December 28, 1897, until January 15, 1898. The period of time sought to be covered by the suit here is from January 15, 1898, to the commencement of this cause before the justice of the peace.

In the Circuit Court appellee obtained verdict and judgment thereon for \$187.50, from which judgment this appeal is prosecuted.

LACKNER, BUTZ & MILLER, attorneys for appellant.

FRED H. ATWOOD, FRANK B. PLEASE and JOHN S. BUTLER, attorneys for appellee.

MR. JUSTICE SEARS delivered the opinion of the court.

But one question is presented upon this appeal which need be considered, viz., the effect of the other and former judgment as a bar to this suit. It is clearly established by the evidence, and not seriously disputed, that the judgment recovered on January 29, 1898, was in part, at least, for wages claimed during the period from December 28, 1897, until January 15, 1898, which wages were not earned by appellee by reason of his wrongful discharge from employment under the contract; or, if not for that, then it was for damages resulting to appellee by reason of the breach of the contract by appellant.

It is contended by counsel for appellee that, when an employe engaged under a contract of hire for a specified time, the wages being payable in installments, is wrongfully discharged before the expiration of the period of hire, such employe may sustain several suits for the respective installments as they became due, as though they had been actually earned, and upon the theory of a constructive service, and that the one of such suits and a recovery thereunder will not operate as a bar to later suits for later installments under the same contract. It is urged that in such case the employe has a choice of remedies, and may either sue for a breach of the contract and recover once for

all his damages sustained, or may treat the contract as continuing, and upon his proffer of services thereunder recover each installment severally, as if it had been earned by actual service. Authorities of other States and England are cited in support of this contention. It will be found, however, that there is a decided conflict of the authorities upon the question, and that the later decisions, both of this country and of England, where the doctrine contended for was first announced, are against the contention. In 1880 the question was raised for the first time in this court, and in *Jones v. Dunton*, 7 Ill. App. 580, in separate concurring opinions by Presiding Justice McAllister and Justice Wilson, the decisions were reviewed with great care and thoroughness. In the opinion of Mr. Justice Wilson, it is pointed out that the doctrine of constructive services had its origin in a *nisi prius* decision in *Gandell v. Pontigny*, 4 Camp. 375, where the fiction of constructive services was resorted to in order to enable a servant, discharged without cause, to recover, under a count of *indebitatus assumpsit*, wages which in part he did not earn, but might have earned but for the wrongful discharge. It also appears that this decision was not followed in *Archard v. Hornor*, 3 Car. & P. 349, where it was held that a recovery could not be had on the common count for wages for any more than the time the plaintiff had actually served. And in *Smith v. Hayward*, 7 Ad. & El. 544, the court approved *Archard v. Hornor*, *supra*, and in effect repudiated the doctrine as announced in *Gandell v. Pontigny*, *supra*.

Other later English cases are cited to like effect, *i. e.*, holding that the doctrine of a constructive service to support an action for wages not earned, is not tenable. *Fewing v. Tisdall*, 1 Exch. R. 295; *Goodman v. Pocock*, 15 Q. B. 576; *Cutter v. Powell*, 2 Smith's Lead. Cas.; note 1245.

That there were American decisions which did not adopt the doctrine of constructive service is supported by the citation of *Moody v. Leverich*, 4 Daly 401, *Whitaker v. Sandifer*, 1 Duv. (Ky.) 261; *Howard v. Daly*, 61 N. Y. 362; to which might have been added *Colburn v. Woodworth*, 31 Barb. 381; *Tarbox v. Hartenstein*, 51 Tenn. 78.

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Since the decision in *Jones v. Dunton*, the question has again arisen in this court, and a like decision reached in *Weill v. Fontanel*, 31 Ill. App. 615.

The decisions in other States since the decision in *Jones v. Dunton*, are, so far as we have been able to find, in substantial accord with the rule as there announced. *Parry v. Am. Opera Co.*, 19 Abbott's New Cases, 269; *Olmstead v. Bach*, 78 Md. 132; *James v. Allen*, 44 Ohio St. 226; *Kahn v. Kahn*, 24 Neb. 709; *Lichtenstein v. Brooks*, 75 Tex. 196; *Richardson v. E. M. W.*, 78 Ind. 422; *Soursin v. Salorgne*, 14 Mo. App. 486.

It will be seen that in several of the cases cited the contract was for payment of wages in installments.

The same doctrine is announced by text writers. 2 *Sutherland on damages*, 475; 2 *Black on Judgments*, Sec. 752; *H. G. Wood's Master and Servant*, 246; *Smith on Master and Servant* (4th Ed.), 188, 165, note; 1 *Addison on Contracts*, 450, .650.

Sutherland says:

“The damages recovered are not wages for constructive services, but compensation for being prevented from earning the stipulated wages according to the contract of hiring.”

Black says:

“A servant unlawfully discharged may treat the contract as rescinded and sue on a *quantum meruit* for services actually rendered, or he may bring his action for damages for breach of contract. He may wait to do this until the term is ended and recover his actual damages, or he may sue at once and recover his probable damages from the breach. But when he has elected his remedy and pursued it, a judgment in one action will be a bar to a further suit.”

Wood says:

“This doctrine (of constructive services) has been adopted in numerous English cases since (*Gandell v. Pontigny*), which it will not be profitable to notice here; but after being repudiated, and again adopted, it was finally exploded, and the doctrine established that a person wrongfully discharged could not, by simply holding himself in readiness to perform his contract, be regarded as having in fact performed it, and thus entitled to sue for and recover his wages for the entire

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term, but that he must be restricted in his recovery to the amount of his actual loss. The action in such cases is not for wages, but for damages for breach of the contract. It can not with any propriety be claimed that an action for wages can be sustained when the servant has in fact rendered no service."

Smith says (page 172), in respect to the common count for wages:

"When the servant elects to pursue this remedy immediately on his discharge, he can only recover wages for the period during which he has actually served. And it is conceived that even if he wait till the expiration of the period for which he agreed to serve, and then bring an action in this form, he can not recover any more."

Addison says:

"Formerly, in certain cases, when the servant had tendered his services, and had been ready and willing to do his work, but had been wrongfully prevented, such tender of service and readiness and willingness to serve were considered tantamount to actual service, and he has been allowed, after the term of service had expired, to recover as for work actually done, etc. * * * But now there is no doubt that this doctrine of constructive service will not prevail," etc.

It is argued by counsel for appellee that the question is settled by decisions of the Supreme Court of this State, and that by such decisions the contention of appellee is sustained, and in this behalf they cite and rely upon the decisions in Hamlin v. Race, 78 Ill. 422, and Mount Hope Cemetery Association v. Weidemann, 139 Ill. 67. We do not understand that either of these cases involved the question here presented. In the former, the only question involved was whether the plaintiff, having brought suit against the employer before the expiration of the period of hire, could, because the suit came to trial after the expiration of that period, recover by way of damages what he might have earned under the contract in the period between the bringing of suit and the expiration of the time of hire. In the latter case the suit was brought and came to trial before the expiration of the period covered by the contract, and a like

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question was there presented, viz., whether damages could be allowed for the failure of the employment during the period after the date of the trial. In neither case was the question of the right to bring several suits upon the several installments of wages essential to a disposition of the case, and in the latter case it is expressly stated that such question is there unimportant.

The only decision of our Supreme Court, where the question here involved can be said to have been, of necessity, considered, is *Trustees v. Shaffer*, 63 Ill. 243, wherein it was held that “when a servant is hired for a fixed period and is discharged without cause during the term, he may recover for the whole time, deducting any amount obtained for work elsewhere, or which might have been obtained by reasonable effort. But the action must be special and not for work and labor done. The damages result from a breach of the contract, in consequence of the wrongful dismissal. The services have never been performed, and therefore *indebitatus assumpit* can not be maintained.” And in support of this decision the court cite, among other cases, *Archard v. Hornor*, *supra*, and *Smith v. Haywood*, *supra*, in which the doctrine of a constructive earning of wages is distinctly repudiated.

We can not regard the decisions of the Supreme Court as having adopted the doctrine for which counsel for appellee contend, and we do regard the decision last cited as distinctly opposed thereto. If the suit first brought, and upon which a recovery was had, can not be treated as a suit for wages, because no wages had been earned, but must be treated as a suit for the breach of the contract, then it is apparent that a recovery in such suit is, in law, a complete recovery of all damages consequent to the breach, and must be held to be a bar to the suit now in question. We therefore hold that the gist of the action first brought, and upon which a recovery was had, not being wages actually earned, was merely the breach of the contract, and that such former recovery is a bar to the suit here in question. The judgment is reversed.

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John Charles Barclay v. Grace Leslie Barclay.

1. PRACTICE—*Presence of Defendant in Court.*—The personal presence in court of a defendant in contempt proceedings at the moment the order is entered is not necessary in order to confer jurisdiction over him where he has had notice of the rule upon him and has appeared and answered to it.

2. SAME—*Presence of Defendant—Presumptions.*—After a party has once been brought into court, the presumption is that he is present and cognizant of any step taken in the cause, until it is terminated, unless considerable time has elapsed without any steps having been taken in the case.

3. SAME—*Juries in Contempt Proceedings.*—A chancery court has authority to enforce its decree through proceedings for contempt without the intervention of a jury.

4. IMPRISONMENT FOR DEBT—*What is Not.*—A commitment in contempt proceedings is not an imprisonment for debt.

Proceedings for Contempt.—Trial in the Circuit Court of Cook County; the Hon. MURRAY F. TULEY, Judge, presiding. Order of commitment entered; appeal by defendant. Heard in the Branch Appellate Court at the October term, 1898. Affirmed. Opinion filed June 9, 1899.

ALEX. J. JONES, attorney for appellant, contended that while a court may commit for contempt in its presence without the service of any process, it is essential to the validity of the order of commitment, even then, that it show that the defendant was present in court when judgment was entered, and no judgment against him would be valid which would be entered in his absence. Louisiana v. Judges, 32 La. Ann. 1256; Trimball v. Barnard, 15 W. N. of C. 127; In re Pollard, 2 Law Rep., Privy Council Appeals, 106; Berkson v. People, 51 Ill. App. 105.

And the defendant must appear in person and not by attorney, in order to give the court jurisdiction of his person. Vin. Abr., Contempt, F. 7; Vertner v. Martin, 10 L. and M. 103; 20 Am. Law Reg., N. S., 149, and cases cited.

JAMES MAHER, attorney for appellee.

In contempt cases for non-payment of alimony, under a

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decree or order, it is not necessary that the defendant be personally present in court; the authorities upon the subject are explicit, and go to far greater lengths than is required by the necessities of the case at bar. Petrie v. People, 40 Ill. 334; O'Callaghan v. O'Callaghan, 69 Ill. 552.

MR. JUSTICE SHEPARD delivered the opinion of the court.

In November, 1895, in a cause in the Circuit Court of Cook County, brought by the appellee against the appellant for separate maintenance, it was adjudged that she was entitled to separate maintenance, and the appellant was decreed to pay for the support of appellee and their infant child the sum of \$40 per month.

In January, 1898, appellee applied in said cause for a rule upon appellant to show cause why he should not be attached for contempt, for failing to pay the moneys so ordered. In support of such application, it was made to appear to the court, by appellee's affidavit, that appellant was then in arrears in the matter of the payments directed to be made by said decree, to the extent of \$612, and a *prima facie* showing of his ability to pay being made by such affidavit, the appellant was ordered to show cause on January 26, 1898, why he should not be attached, etc.

That order to show cause, was, on the day the rule was returnable, extended, "on motion of solicitor," to January 31, 1898.

Upon the last mentioned date a hearing upon the rule to show cause was had, and, among others, the affidavit of the appellant was introduced and read. He therein admitted that there remained unpaid by him under said decree "the sum of over \$612," and set forth at great length numerous matters in alleged excuse or extenuation of his delinquency.

The order of the Circuit Court thereupon entered, and from which this appeal is prosecuted, is as follows:

"Upon the return of the rule issued in this cause, to show cause why the defendant, John Charles Barclay, should not be attached for contempt of court for failure to pay arrears

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of alimony heretofore due under the decree entered in this cause, and the court having jurisdiction in said cause and having heard and read the affidavits on behalf of the complainant and of the defendant, and all parties being present in open court by counsel, and the court having heard arguments of said counsel, doth find that there is now due and unpaid from the defendant to the complainant, the sum of six hundred and twelve dollars (\$612) for arrears of alimony under said decree, no part of which has been paid; and the court further finds that no sufficient cause is shown by the said defendant why the same should not be paid, or that he has been or is unable to pay the same, but that he willfully fails and refuses to obey the orders and decree of this court in paying said alimony; and the court doth find and adjudge the said John Charles Barclay to be guilty of a contempt of this court, and doth order that said John Charles Barclay be committed to the common jail of Cook county, Illinois, there to remain charged with said contempt of this court, until he pay the said sum of six hundred and twelve dollars (\$612) into this court or until released by due process of law, and that a warrant for that purpose issue forthwith, directed to the sheriff of Cook county, Illinois."

We have read and considered with diligent attention everything that was before the Circuit Court at the hearing, and concur with the learned chancellor in his findings of fact, as expressed in his order, as above.

This leaves only certain alleged errors of law to be considered.

It is said that the record shows the order was entered in the absence of appellant, and that the court was without jurisdiction of his person at the time of said judgment. The order recites that the court had jurisdiction, and nothing to the contrary anywhere appears. It also appears by the order, and by the certificate of evidence, that appellant was present by counsel, and his own affidavit was read.

But the personal presence of the appellant, at the moment the order was entered, was not necessary in order to confer jurisdiction over him in a proceeding of this kind. The certificate of evidence shows he had notice of the rule, and that he appeared and answered to it. Nothing more was necessary. It is enough that the court had jurisdiction of the person of the appellant, in the cause in which the order

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was entered, and that he had notice of the application for the particular order in question. The rule in this State is, that "after a party has once been brought into court, the presumption is that he is present and cognizant of any step taken in the cause, until it is terminated, unless there has been considerable time elapsed without taking any steps in the case." Petrie v. The People, 40 Ill. 334; O'Callaghan v. O'Callaghan, 69 Ill. 552; Berkson v. The People, 51 Ill. App. 102, affirmed in 154 Ill. 81.

It is also contended that the appellant was entitled to a trial by jury, it not appearing that he formally waived that right; and, further, that the order is in violation of the constitution relating to imprisonment for debt.

The power of a chancery court as distinguished from the policy of exercising the power to enforce its decrees through proceedings for contempt, without the intervention of a jury trial, can no longer be questioned (Debs case; People v. Kipley, 171 Ill. 44); and for authority that an order of the kind of the one in question is not an imprisonment for debt, see Wightman v. Wightman, 45 Ill. 167.

The other argued questions are in substance but refinements of those we have mentioned.

Perceiving no substantial error in the record, the order of the Circuit Court is affirmed.

Alonzo J. Whiteman v. The People, etc.

1. CRIMINAL LAW—*Proof of Corporate Existence*.—In all criminal prosecutions involving proof of the legal existence of a corporation, user is *prima facie* evidence of such existence.

2. EVIDENCE—*Things Found in a Person's Possession*.—In a prosecution for obtaining money by means of a worthless draft, other drafts similar to that mentioned in the indictment found in the defendant's possession, are competent as tending to show guilty knowledge and intention.

3. CROSS-EXAMINATION.—A person on trial should not be deprived of his legal right to examine or cross-examine witnesses, because of an

inadvertent offensive expression, either by himself or his counsel, but if it does not appear that he was in any way injured, it will not be reversible error.

Indictment, for obtaining money on a worthless draft. Trial in the Criminal Court of Cook County: the Hon. ARTHUR H. CHETLAIN, Judge, presiding. Verdict and judgment of guilty; error by defendant. Heard in the Branch Appellate Court at the October term, 1898. Affirmed. Opinion filed June 9, 1899.

H. STUART DERBY, attorney for plaintiff in error.

C. S. DENEEN, State's attorney, HARRY OLSON, assistant State's attorney, for the defendant in error.

In an indictment charging a person with the commission of an act injurious to a corporation, it is sufficient description of the corporation to set forth its corporate name and then to allege that it is a corporation, without adding that it is duly organized under the laws of any State, thus: "A certain corporation, to wit: The Chicago and Alton Railroad Company, the same being then and there incorporated." Bishop's Directions and Form, Sec. 79; Wallace v. People, 63 Ill. 451; Staaden v. People, 82 Ill. 434; Sykes v. People, 132 Ill. 32, 45; 1 Bish. New Crim. Proc., Sec. 682; 2 Bish. New Crim. Proc., Secs. 455, 456; McCarney v. People, 83 N. Y. 408, 38 Am. Rep. 456.

It is sufficient to prove that the corporation exists *de facto*. State v. Mead, 27 Vt. 722; People v. Schwarz, 32 Cal. 161; Hughes Case, 29 Cal. 257; 1 Bish. New Crim. Proc., Sec. 682, 2; 2 Bish. New Crim. Proc., Sec. 752, 2; Kincaid v. People, 139 Ill. 213, 216; Whart. Cr. Ev., Secs. 102, 164 (9th Ed.); Calkins v. State, 18 Ohio St. 366; State v. Thompson, 23 Kan. 338; State v. Baltimore & Ohio R. R., 15 W. Va. 362; State v. Grant, 104 N. C. 908, 10 S. Rep. 554; State v. Collens, 37 La. Ann. 607.

If to the corporate name and the allegation that it is incorporated there be added the allegation "organized under and by virtue of the laws of the State of Illinois," etc., said last allegation may be rejected as surplusage, because unnecessary. McCarney v. People, 83 N. Y. 408; Chrichton v.

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The People, 6 Parker C. R. 370; People v. Gilkinson, 4 Parker C. R. 29; Roscoe Crim. Ev., 134 (8th Ed.) 90.

MR. PRESIDING JUSTICE FREEMAN delivered the opinion of the court.

Plaintiff in error was indicted under section 96 of the Criminal Code. It is alleged that he obtained \$250 from the Grand Pacific Hotel Company on a worthless draft purporting to have been made by the Lawrence National Bank of Lawrence, Kansas, signed by the cashier of said bank, and drawn on the First National Bank of New York City. The draft was, by its terms, payable to the order of Frank W. Bowman, and by him apparently indorsed payable to the order of E. M. Clark, by which name the plaintiff in error registered at the Grand Pacific Hotel, Chicago. When at the end of a week his bill for board, amounting to \$61.09, was presented, he gave the cashier of the hotel company the draft in question, saying that the balance over and above his board could be placed to his credit. The next day he asked for and received \$50 on account, and the day following came, apparently in a hurry, asked for his baggage, proposed to leave his address, and requested that the balance of the money be sent to him. The clerk, however, told him to wait a moment, obtained the balance necessary to make up the amount of the draft, and paid him \$125.36 in currency after deducting whatever was due for board.

Whiteman was subsequently arrested in St. Louis, where he was stopping at the Southern Hotel under the name of W. H. Martin. In his satchel, upon which was a tag bearing the name of W. H. Martin, with the number of his room at that hotel, were found a considerable number of drafts, apparently made by the Lawrence National Bank, purporting to be signed by the cashier, Walter L. Howe, and drawn on the First National Bank of New York City. These drafts were similar to that described in the indictment, varying only in the amounts, respectively, and in the names of the payees. There was also a letter addressed to the First

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National Bank of New York, introducing one John F. Eaton, stating that he was on his way to Europe with drafts to the amount of three thousand dollars, would want foreign currency and exchange, that any courtesy extended would be greatly appreciated, and purporting to be signed by Walter L. Howe, cashier.

Mr. Howe was present at the trial as a witness for the State, testified that these drafts, including that mentioned in the indictment, were not issued by the Lawrence National Bank, and that the signatures of his name to the drafts and letter were not his signatures.

Whiteman was found guilty, duly sentenced, and now prosecutes his appeal.

It is urged in his behalf that there was error in the admission of evidence as to the incorporation of the Grand Pacific Hotel Company; that it having been alleged said company is a corporation organized and existing under the laws of Illinois, it was incumbent upon the State to prove the fact as laid, by the best evidence, namely, the certificate of incorporation or a certified copy. Sec. 486 of the Criminal Code provides "that in all criminal prosecutions involving proof of the legal existence of a corporation, user shall be *prima facie* evidence of such existence." (See Kincaid v. The People, 139 Ill. 213-216.) The evidence shows that the company in question is doing business under the name of the Grand Pacific Hotel Company, as a corporation of the State of Illinois. We regard the objection as not well taken.

It is said that the alleged worthless draft was improperly admitted in evidence because of variance. The alleged variance consists in the omission from the copy of the draft as set out in the indictment, of the signature "E. M. Clarke" upon its back. The indictment charges that the plaintiff in error "Alonzo J. Whiteman, otherwise called E. M. Clarke," falsely pretended to the clerk of the hotel company that the draft in question was a good and valid draft. The draft is then set out *in haec verba*, showing that it was payable to the order of Frank W. Bowman, and by him apparently

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indorsed payable "to the order of E. M. Clarke." It will be noticed that the indictment charges the false pretense to have been that the draft was good and valid. It does not charge any false pretense to the hotel company that the name of plaintiff in error was E. M. Clarke. The indorsement "E. M. Clarke" was made by Whiteman to transfer the draft to the hotel company. It was no part of the draft itself. The clerk of the hotel testified that he looked at the register and saw that the signature "E. M. Clarke" on the back of the draft was the same as that on the register, thus identifying the indorser as the guest passing under that name, and the draft was thereupon accepted. The State may have been unable to prove any false pretense by the defendant inducing the hotel to accept the draft on the ground that his name was E. M. Clarke. The indictment does not make any such charge. We do not regard the name so indorsed by the plaintiff in error, in order to transfer the draft, as part of the instrument which the indictment charges was falsely represented to be good and valid, and hence the variance is not material. *Trask v. The People*, 151 Ill. 523-528. It has been held that anything appearing on the paper which is no part of the contract may be omitted in the indictment. *Langdale v. The People*, 100 Ill. 263-268. If the draft had been actually good and valid and the prisoner its rightful owner, the fact that "E. M. Clarke" was not his real name, would not have affected its value or collection.

A quantity of other drafts similar to that mentioned in the indictment, together with envelopes, stamps and other documents which were, as the evidence tends to show, found in Whiteman's possession when he was arrested, were introduced in evidence.

This evidence was clearly competent as tending to show guilty knowledge and intention. If, as his counsel suggests, he might have them and still have been innocent of the charge contained in the indictment, it was open to him to explain their possession, which he did not attempt.

It is said that no representations, false or otherwise, were

made as to the genuineness of the worthless draft. It is not necessary to make verbal representations. Conduct is often fully as expressive as words, and the passing for value of a draft known to be worthless is a sufficient false pretense. Bishop's Commercial Law, Sections 430-448.

It is urged that the court seriously erred in excusing certain witnesses and refusing to allow the defendant to continue their cross-examination. The defendant in person undertook to cross-examine two of the State witnesses. His questions were properly overruled, not being in any sense cross-examination. After several such questions had been put, the court in each case advising the witness that he need not answer them, the witnesses were respectively excused, over the objection of counsel for the prisoner. This might no doubt have been serious error if the witnesses had been excused from answering any proper or material question. But no such question was put, and it does not appear that the prisoner was in any way prejudiced by the refusal of the court to allow him to prolong such an attempt at cross-examination. The action of the court was, we think, right, although the reason for it was wrong. The question was put to the witness as follows:

"The Prisoner: Mr. Taylor, did you pay me any money?

The Court: That you need not answer. He has not said he did.

The Prisoner: The indictment claimed so.

The Court (to the witness): You may be excused. Call your next witness. It is the rule of this court, whenever a lawyer talks back to the court, to excuse the witness.

The Prisoner: But I didn't know that.

The Court: Now you know it.

Mr. Derby: May he not examine this witness? He is not familiar with the rule of the court.

The Court: I have always up to the present time run this court. I don't see any different rule now. If a man undertakes to defend himself, I can't undertake to make a new rule for him. When a man undertakes to tell me or tell the witness what is in the indictment that is the time to quit."

We can not, of course, from this record know whether there was anything in the prisoner's manner or conduct that

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was offensive, but the words used are not in themselves especially objectionable. This was the prisoner, not his counsel, who was trying to conduct the cross-examination, and the law is always jealous of any act on the part of the court that in any way obstructs or hinders a prisoner on trial from putting forward anything and everything which may properly tend to establish his defense or maintain his innocence. When a lawyer or client “talks back to the court” he can be punished for any contempt, and if clearly necessary to maintain the dignity of the court and protect its procedure, should be so punished. But the prisoner on trial, whose liberty is at stake, can not be deprived of his legal right to examine or cross-examine witnesses, because of an inadvertently offensive expression either by himself or his counsel. As, however, it does not appear that the prisoner was in any way injured by excusing the witnesses in question, we do not regard the court’s action as prejudicial.

In view of what we have said it is not necessary to discuss in detail the other alleged errors. The evidence amply justified the verdict of the jury and the sentence of the court. Finding no serious error the judgment of the Criminal Court is affirmed.

G. Willard v. H. B. Saunders, for Use of, etc.

1. **PRACTICE—*Passing Cases on the Short Cause Calendar.***—Absence of an attorney engaged in the trial of a suit elsewhere is sufficient cause for passing a case temporarily, and setting it for trial at the foot of the call for the next day.

Appeal, from the Superior Court of Cook County; the Hon. JOSEPH E. GARY, Judge, presiding. Heard in this court at the October term, 1898. Affirmed. Opinion filed June 29, 1899.

SIDNEY B. SMITH, attorney for appellant.

FREDERICK PEAKE, attorney for appellee.

MR. JUSTICE ADAMS delivered the opinion of the court.

This is an appeal from a judgment in favor of appellee and against appellant for the sum of \$93, rendered in the Superior Court on appeal from a judgment rendered by a justice of the peace. On notice given in accordance with the statute, the cause was placed on the short cause calendar, and was reached for trial on that calendar Monday, June 20, 1898, when, it appearing to the court that appellant's attorney was then engaged in the trial of another cause elsewhere, the court ordered the cause placed at the foot of the regular trial call for the next day, which was done. It was not reached on that call until Wednesday, when it was called, and the attorney for appellant moved that the cause be stricken from the call, which motion was overruled, whereupon he moved that the cause be continued, which motion was also overruled, and a jury was called and impaneled, who, on evidence produced by the appellee, rendered a verdict on which the judgment appealed from was rendered.

Appellant's counsel objects that the court erred in overruling his motion to strike the cause from the call, and also his motion to continue the cause, and that the verdict is not warranted by the evidence.

In support of the motion to strike the cause from the call, appellant's attorney read certain rules of the trial court, one of which provides that cases on the short cause calendar shall be called in their order. The case was called in its order, but the court, on it appearing that appellant's attorney was engaged in the trial of another cause, passed the case temporarily, setting it for trial at the foot of the call for the next day. The cause for so passing it was sufficient.

In Curran v. Belding Co., 59 Ill. App. 76, a cause on the short cause calendar for October 9th was ordered to stand for trial October 15th then next, on account of the convenience of the appellee and one of its witnesses. The court held that for good and sufficient cause this might be done; that the matter rested in the discretion of the court, and that there was no abuse of discretion.

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Appellant's counsel admits that it does not appear whether or not the cause had been on the regular trial calendar before being placed on the short cause calendar, and assumes that the court, by placing it at the foot of the call for the next day, placed it on the regular trial calendar, and tried it out of its order on that calendar. The postponing the trial, and placing the cause on the call for next day, was not placing it on the trial calendar, but merely designating proximately the time when it would be tried. The cause was tried as a short cause calendar case at a time to which it had been postponed for appellant's convenience. Appellant certainly can not complain because the court, when the case was regularly called on the short cause calendar, did not proceed to try it in the absence of his attorney. The motion to strike the cause from the call was properly overruled, as was also the motion for a continuance, which latter motion was unsupported by affidavit. We think the evidence sufficient to support the verdict. Appellant, who was present, by his attorney, offered no evidence.

The judgment is affirmed.

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1. CONTRACTS—*Can Not be Enforced by Piecemeal.*—If a contract is legal and binding upon a party he can not disregard the plain provisions of one part of it which he deems harsh or burdensome, and at the same time have a court of equity enforce another part which he thinks advantageous to him as a valuable property right.

2. EQUITY PRACTICE—*Recovery to be upon the Grounds Stated in the Bill.*—No relief in equity can be granted without appropriate allegations in the bill upon which to base such relief. The recovery must be upon the grounds stated in the bill.

Bill for an Injunction.—Trial in the Circuit Court of Cook County; the Hon. ARBA N. WATERMAN, Judge, presiding. Decree dismissing the bill; appeal by complainant. Heard in this court at the October term, 1898. Affirmed. Opinion filed June 29, 1899.

Statement.—Appellant is an Illinois corporation, and had, for some time prior to March, 1893, been engaged in

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the publication of a daily and also a weekly newspaper at Chicago, its principal place of business.

The appellee is also an Illinois corporation, organized in the year 1892, for pecuniary profit, and the purpose for which it was organized was "To buy, gather and accumulate information and news; to vend, supply, distribute and publish the same; to purchase, erect, lease, operate and sell telegraph and telephone lines, and other means of transmitting news; to publish periodicals, to make and deal in periodicals and other goods, wares and merchandise." Appellee's stockholders are exclusively the proprietors of newspapers, and its principal and only business is buying, gathering and accumulating information and news, and the distribution and furnishing of the news so gathered to persons and corporations who have entered into contracts therefor with appellee, in the form prescribed by its by-laws, and the persons and corporations to whom and for whose benefit the said news is so gathered, in and by the by-laws of appellee, are designated or termed members, but many of the persons and corporations to whom the news so gathered is furnished under said contracts are not stockholders. The term members, used in the by-laws of appellee, is not limited or restricted to its stockholders, but applies to all proprietors of newspapers who may or shall at any time enter into a contract with appellee for procuring the news furnished by it. Appellee has not availed itself of its power or franchise to purchase, erect, lease, operate and sell telegraph and telephone lines, nor has it availed itself in any way of the power of eminent domain granted it by its charter. It has also confined its business to its members exclusively, and has not sold nor distributed its news to any person or corporation not a member, though it sells the information and news accumulated by it to the proprietors and publishers of nearly all the principal newspapers published in the United States of America, all of such proprietors and publishers being its members.

The by-laws of appellee were adopted and ratified by its stockholders December 21, 1892, which was prior to the

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time that appellant became a stockholder of appellee, and prior to appellant's contract with appellee, which is in question in this case.

These by-laws have, among other provisions, the following, to wit:

“Article XI, Section 8. Sale or Purchase of Specials.—No member shall furnish or permit any one to furnish its special or other news to, or shall receive news from, any person, firm or corporation, which shall have been declared by the board of directors or the stockholders to be antagonistic to the association; and no member shall furnish news to any other person, firm or corporation engaged in the business of collecting or transmitting news, except with the written consent of the board of directors.”

“Article XIV, Section 1. Board may Suspend.—The board of directors shall have the power, by a two-thirds vote of the whole board, to suspend a member or impose upon him a fine not exceeding \$1,000 for furnishing news to any person or association antagonistic or in opposition to the Associated Press; or for purchasing news from any person or organization formally declared by the board of directors, or by the stockholders of the association, at any annual or special meeting, to be in such antagonism or opposition, or for any other violation of the by-laws or his contract; provided, always, that ten days' notice, in writing, of a complaint, be first served upon the offending member, and said member shall have an opportunity to be heard in his own defense, and if said member shows that the offense was unintentional, and shall have discontinued the same, he shall not be suspended.”

They further provide a method of appeal from orders of suspension and for forfeiture of membership in case the action of the board should be sustained.

March 2, 1893, appellant, then being a stockholder of appellee, made an agreement with appellee by which the latter sold to appellant the night news report of appellee for the term of ninety-two years, for publication in appellant's newspaper, which appellant agreed to receive, and pay therefor \$103 per week in advance, and any additional weekly assessments made by appellee, not exceeding fifty per cent of the amount of said weekly installment. Appellant also agreed to furnish to appellee the news, local and

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telegraphic, within a radius of sixty miles of Chicago, in accordance with the requirements of appellee's by-laws. By the contract appellee reserved the right to change the weekly assessment of appellant without limit, which appellant agreed to pay as long as it took the news report, but in case such changed assessment should exceed fifty per cent of the weekly payment of \$103, appellant had the right to terminate the contract and surrender its stock to appellee, for which the latter should pay the par value thereof. The contract also contained the following, among other provisions, to wit:

"6th. Said party of the second part covenants and agrees that it will not furnish before publication any news to any person or corporation engaged in the business of collecting or transmitting news except upon the written consent of the board of directors of the party of the first part first had and obtained; and that it will not furnish to any person any of the news received by it under this contract before publication by it; and that it will not furnish its special or other news to or receive news from any person or corporation which shall have been declared by the board of directors of said party of the first part antagonistic to said party of the first part, after having received notice of such declaration.

"7th. It is further mutually agreed between the parties hereto that the rights, duties and obligations of the respective parties hereto, except as hereinbefore specifically provided for, shall be controlled and governed by the by-laws of said party of the first part now or hereafter in force during the life of this contract; and that the right to receive news under this contract may be suspended or terminated in the manner and for the causes specified in said by-laws.

"9th. Said party of the first part promises and agrees not to furnish any news report to any newspaper published in the said territory described in this contract not now entitled to receive the same under the by-laws of said party of the first part, without the written consent of the said party of the second part or its assigns.

"10th. Said party of the second part has assigned and transferred its stock in the said party of the first part to the said party of the first part, which stock is to be held by said party of the first part as security for the performance by said party of the second part of this contract on its part. Said party of the second part, in consideration of the mak-

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ing of this contract by said party of the first part, hereby covenants and agrees that it will not sell or part with any interest in said stock to any party who shall not be the proprietor of a newspaper which shall at the time be on the membership roll of said party of the first part; and that it will keep and observe and perform all the requirements of the by-laws of said party of the first part now or hereafter in force during the life of this contract."

The contract was signed, viz.:

"THE ASSOCIATED PRESS,

Wm. PENN NIXON, President.

DELAVAN SMITH, Secretary. [SEAL.]

THE INTER OCEAN PUBLISHING CO.

Wm. PENN NIXON, Secretary and Treasurer."

Contracts substantially of the same import as the one with appellant have been made from time to time since December, 1892, between appellee and the proprietors and publishers of a majority of the leading newspapers throughout the United States, which contracts have been enforced by appellee; and appellant had not, until the filing of the bill in this case, made any objection to the enforcement of appellee's by-laws against its members or stockholders regarding the receipt of news service from persons or corporations antagonistic to appellee, and on at least two occasions, in the years 1894 and 1895, made complaints to appellee of violations of the by-laws by other members in this respect.

William Penn Nixon, who signed appellant's contract with appellee as president, was appellee's president to February, 1894, and was also secretary of appellant from the date of said contract to the filing of the bill in this case, as well as editor in chief of appellant's newspaper from May, 1894, to November 18, 1897.

Upon complaints being made to appellee in December, 1897, and in January, 1898, by the Chicago Herald Company and The Chicago Daily News Company, respectively, that appellant had violated its said contract with appellee, and had also violated section 8 of article 11 of appellee's by-laws, by receiving news from The Sun Printing and Publishing Association of New York City, The New York Sun

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of New York City, and The Laffan News Bureau of New York City, all of which concerns had been declared by appellee's board of directors to be antagonistic to appellee, and asking that said contract and section 8 of article 11 of the by-laws be enforced, appellee gave notice to appellant that a meeting of appellant's board of directors would be held at a time and place named to take action on said complaints.

Before the time set for hearing said complaints appellant filed its bill seeking an injunction against appellee from suspending or expelling it from its membership, from refusing to give appellant news as required by the terms of said contract, and from doing any act or thing tending to deprive appellant of the service of appellee, as provided in the contract, and for all such other relief, both general and special, as to the court may seem just, etc.

It is alleged by the bill, in substance, that while appellee's charter gives it the right to vend and supply news generally to all persons who will pay for the same the price fixed by appellee, and also gives to appellee the power of eminent domain, appellee, in violation of its public obligations under its charter, vends and supplies its news exclusively to its members, and has by this means been able to control the business of buying and accumulating news and selling the same, and thus to create in itself an exclusive monopoly or trust in that business; that appellee has, in order to create such exclusive monopoly or trust, declared that The Sun Printing and Publishing Association of New York, which appellee claims to be a rival or competitor in business, is antagonistic to appellee, and has prohibited the members of appellee from buying news from said Sun Printing and Publishing Association, under pain of suspension and expulsion from appellee; that appellee had at various times, by threats of suspension and expulsion, made under its by laws, forced and compelled divers of its members to cease buying the special news of said Sun Printing and Publishing Association, under divers valid and subsisting contracts between said members and said association to purchase special news

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which they could not obtain from appellee, the details of which contracts and the names of said members are set out in the bill; that the action of appellee, in serving the notices on appellant for a hearing on said complaints against appellant, is similar in kind to appellee's initial action against its other members above referred to, which resulted in their being forced to cease buying special news from said Sun Printing and Publishing Association; that appellant is in duty bound, both to its patrons and the public, to publish all the news, and if it be not able to obtain such news from one source, it must, in justice to its patrons and the public, obtain the same from other sources, if the same be possible; that the news which it obtains from appellee it was and is unable to obtain from any other source, and that appellee would not furnish such news to appellant unless it executed with appellee the contract hereinbefore set out, but, on the contrary, refused to furnish such news except upon the execution of said contract, and appellant was forced to and did execute such contract; that appellee does not furnish all the news to appellant under the said contract, and to obtain the news not so furnished appellant has been and is forced to resort to other sources, among which is the The Sun Printing and Publishing Association of New York; that appellant is not now, and never has been, furnishing news to The Sun Printing and Publishing Association, the New York Sun, or the Laffan News Bureau of New York, as charged in said complaints, and that this The Chicago Daily News Company, through its officers, well knew when it made its said complaint; and appellant charges the fact to be that the complaint last aforesaid is made in collusion with appellee, and solely for the purpose of annoying and harassing appellant; that said contract between appellee and appellant is a valuable property and property right, but that the news to be furnished under it is not all the news needed by appellant in publishing its newspapers; that certain news which appellant absolutely must have, it is unable to obtain from appellee, and appellant is forced to obtain the news not obtainable from appellee from The

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Sun Printing and Publishing Association; that appellee, in attempting to force appellant to cease taking news from The Sun Printing and Publishing Association, is endeavoring to work irreparable injury and damage to appellant, and tends to create a monopoly in appellee.

Appellee admits it has declared The Sun Printing and Publishing Association to be antagonistic to appellee, and has prohibited its members from buying news from said association, and also admits that appellee would not have furnished its news to appellant if the latter had not made the contract in question herein.

The cause was heard upon the bill and answer of appellee, both of which were under oath, and certain affidavits, all of which were read and used as depositions in the cause, and a decree rendered dismissing the bill for want of equity.

The facts as above stated, among others which we deem it unnecessary to set out, appear from the bill, answer and affidavits.

DAVID J. BAKER, EGBERT JAMIESON and JOHN A. ROSE, attorneys for appellant.

JOHN P. WILSON, attorney for appellee; T. A. MORAN, of counsel.

MR. JUSTICE WINDES, after making the foregoing statement, delivered the opinion of the court.

It appears from the foregoing statement that appellant is seeking to enforce specifically one part of a contract between it and appellee, when it is also shown that appellant has disregarded and violated another part of the same contract. In other words, appellant asks this court to allow it to retain its membership and stock in the Associated Press, and have the benefit of the news accumulated by the latter, at the contract price, without complying with that part of the contract which requires appellant to refrain from receiving news from any person or corporation which has been declared by appellee's board of directors antagonistic to appellee, and without appellant being controlled or governed

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by the by-law of appellee to the same effect, which appellant, by the contract, agreed should control and govern it during its membership in appellee.

It needs no argument nor the citation of any authority to establish the proposition that, if the contract in question is a legal one, and binding upon appellant, it can not disregard and violate the plain provisions of one part of its contract which it deems harsh or burdensome, and at the same time have a court of conscience enforce another part of the same contract which it thinks advantageous and a valuable property right.

But it is contended by appellant's counsel that appellee, by the adoption of its by-laws and its insistence upon the contracts with its members, has created a monopoly in its business which by the common law is affected with a public interest; that the provision of appellant's contract with appellee, which prohibits appellant from receiving news from any person or corporation which appellee shall have declared antagonistic to appellee, is illegal as being in restraint of trade; that appellee's by-law to the same effect is unreasonable and void, and that because of the public nature of appellee's business, which it is said is a monopoly, or trust, appellee should be compelled to serve the public equally and for a reasonable compensation. We deem it unnecessary on this record to decide that appellee's business is a monopoly, or that its business is affected with a public interest, or that the said provision in the contract is illegal, or that the said by-law is unreasonable and void, for the reason that all these matters are immaterial in view of the case made by appellant's bill, and therefore do not discuss the several questions so fully and ably presented by the briefs of counsel. But if it be conceded that all these contentions of appellant are established, and that it follows, as matter of law, that appellee should be compelled to serve the public equally and for a reasonable compensation, appellant's bill can not be maintained. The prayer of the bill only asks for relief based upon appellant's alleged rights as they are claimed to be under the contract between appellant and

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appellee. Omitting the preliminary and formal facts, it asks an injunction, viz.:

"From suspending or expelling the complainant from its membership, and from refusing to give to the complainant its news, as required by the terms of the said contract, and from doing any act or thing tending to deprive the complainant of the service of the defendant, as provided in the said contract; and that on the final hearing of this cause the said preliminary injunction may be made perpetual, and that your honor will grant to the complainant all such other relief, both general and special, as to the court may seem just and the nature of the case may require."

Appellant's right, if any, to be protected from being suspended or expelled from membership, rests upon its compliance with its contract with appellee and its obedience to the by-laws. As we have seen, the contract contains a provision that appellant shall be controlled and governed by the by-laws. Therefore this part of the relief asked is based upon the contract which appellant has violated. All the other specific relief asked is in the express words of the prayer based upon the contract. Counsel, in their reply brief, say that the bill "does base its (appellant's) right to receive the news of appellee upon the contract," but claims that the contract is a regulation of appellee's business, by which it has fixed what it deems a reasonable compensation for the news furnished by it to appellant. The prayer for general relief is not sufficient to allow an injunction which would restrain the appellee, independent of the contract, from refusing to give appellant, as one of the public, the news which had been accumulated by appellee, upon the payment of a reasonable price therefor, because there are no allegations in the bill on which to base any such relief. The bill does not allege that appellant ever claimed or that it ever requested a news service from appellee, otherwise than under the contract in question, nor does it allege that the price agreed upon in the contract would have been or was a fair and reasonable price for the news agreed to be furnished by appellee, independent of the services by the contract agreed to be rendered by appellant to appellee which was to furnish appellant with the news within a

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radius of sixty miles of Chicago, and also independent of a compliance with other provisions of the contract and obedience to appellee's by-laws. All the allegations of the bill are based upon appellant's alleged rights under and by virtue of said contract, and upon the claim that it should be enforced when stripped of the provision claimed to be illegal. It is a familiar rule of chancery that no relief can be granted without appropriate allegations in the bill on which to base such relief. Recovery must be had, if at all, on the grounds stated in the bill. Flinn v. Owen, 58 Ill. 111; Purdey v. Hall, 134 Ill. 298, 305; T. H. & I. R. R. Co. v. P. & P. U. Ry. Co., 167 Ill. 296, 307; Lane Union Nat. Bk., 75 Ill. App. 299.

Without the allegations above indicated no relief, as contended for by appellant, could be granted under the prayer for general relief.

The decree dismissing the bill for want of equity is therefore affirmed.

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1. **INSOLVENT CORPORATIONS—*Rights of Simple Contract Creditors Under Sec. 25 of Ch. 32, R. S.***—A simple contract creditor may avail himself of the provisions of section 25 of the general incorporation act and file a bill to obtain the relief afforded by that section, and such a bill is in the nature of a creditor's bill and is designed to aid creditors in the collection of their debts.

2. **EQUITY PRACTICE—*Relief Under Section 25 of the General Incorporation Act.***—A simple contract creditor can not maintain a bill against an insolvent corporation under the provisions of section 25 of the general incorporation act, and, without obtaining any of the relief provided by that section, obtain in lieu thereof relief by having a fraudulent conveyance made by the debtor corporation set aside, and assets, which were thereby conveyed prior to the filing of the bill of complaint, subjected to the satisfaction of his claim.

3. **STATUTES—*Section 25 of the General Incorporation Act.***—Section 25 of Chapter 32, R. S., entitled "Corporations," contemplates a distribution of all the assets which an insolvent corporation had at the time of the

beginning of the suit, and a transfer of such assets, made after a bill of complaint is filed and summons served, will be set aside in order to effect such distribution.

4. *SAME—Construction of Section 25 of the General Incorporation Act.*—Section 25 of the general incorporation act does not operate to enlarge the operation of section 49 of the chancery act. A mere contract creditor can not come into a court of equity for the simple purpose of enforcing a legal demand which involves the right to a trial at law.

5. *RECEIVERS—Powers Under Section 25 of the General Incorporation Act.*—A receiver can not assert any right in equity in winding up the affairs of an insolvent corporation which could not be asserted by the general creditors or by the corporation itself. The corporation itself could not invoke the aid of a court of equity to that end, nor could an assignee of such corporation.

Bill in Equity.—Trial in the Superior Court of Cook County; the Hon. HENRY V. FREEMAN, Judge, presiding. Decree for complainant; appeal by defendants. Heard in this court at the October term, 1898. Reversed and remanded. Opinion filed June 29, 1899.

Statement.—Two suits in equity were consolidated and heard together in this proceeding. The decree is upon the consolidated cases. The complainant in each bill of complaint was, at the time of beginning the suit, a simple contract creditor of the Climax Cycle Company, an insolvent corporation. By each bill of complaint relief was sought under section 25 of the incorporation act, and the allegations of each would entitle to relief under that section. In each bill of complaint it was also alleged, in effect, that the insolvent corporation had, prior to the filing of the bill, fraudulently conveyed certain of its assets to appellant, and by each bill relief was also prayed by setting such fraudulent conveyance aside and subjecting the property thereby conveyed to the satisfaction of the contract claims of the complainants.

Upon the hearing of the consolidated cases the chancellor found that the Climax Cycle Company was an insolvent corporation; that it had ceased doing business, leaving debts unpaid; that the conveyance in question to appellant was fraudulent as against creditors of the corporation, and should be set aside; and decreed that the sale by the corporation to appellant, Cohn, is void and of no effect as to the

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creditors of the corporation; that the proceeds of the property taken from the possession of the appellant Cohn (being the property which was transferred to Cohn by the corporation through the conveyance in question) be subject to the debts and obligations of the corporation, and that complainants have and recover for their own use and for the use of other creditors, such proceeds; and a reference was ordered to a master in chancery to take an account as to the distributive interests of the creditors of the corporation in such property. From this decree appellant prosecutes this appeal.

PAM, DONNELLY & GLENNON, attorneys for appellant.

WILBUR, TURNER & HILL and REMY & MANN, attorneys for appellees.

MR. PRESIDING JUSTICE SEARS delivered the opinion of the court.

Of the several questions raised by the briefs of counsel, we need consider but one, viz., whether a simple contract creditor may file a bill of complaint against an insolvent corporation under the provisions of section 25 of the incorporation act, and, without obtaining any of the relief provided by that section, obtain in lieu thereof relief by having a fraudulent conveyance made by the debtor corporation set aside, and assets, which were thereby conveyed prior to the filing of the bill of complaint, subjected to the satisfaction of the simple contract claim.

It is settled that a simple contract creditor may avail of the provisions of section 25, and may file a bill of complaint to obtain the relief afforded under that statute. Buda F. & M. Co. v. The Columbia Celebration Co., 55 Ill. App. 381.

And such a bill has been referred to as being in the nature of a creditor's bill and designed to aid creditors in the collection of their debts. Butler Paper Co. v. Robbins, 151 Ill. 588.

And it has been held that as the enactment contemplates a distribution of all the assets which the insolvent corpora-

tion has at the time of the beginning of the suit, therefore a transfer of such assets made after bill of complaint filed and summons served will be set aside in order to effect such distribution of assets. *Bailey v. Snyder*, 61 Ill. App. 472.

But we are not aware of any adjudicated case in which it has been held by the Supreme Court, or by this court, that assets not in possession of the insolvent corporation when the bill is filed, but which had been fraudulently transferred prior thereto, can be reached by a simple contract creditor who is proceeding under the provisions of section 25 in question. When the only scope of the proceeding, measured by the relief decreed, is to subject such equitable assets to the satisfaction of the legal claims of such creditors, as is the case here, we are of opinion that the bill can not be thus entertained for such purpose alone, and relief granted which the creditor could not obtain if his bill were appropriately framed for the obtaining of only that relief which is granted. In other words, section 25 of this act does not operate to enlarge the operation of section 49 of the chancery act. A mere contract creditor can not come into a court of equity for the simple purpose of enforcing a legal demand—one which involves the right to a trial at law. *Shufeldt v. Boehm*, 96 Ill. 560; *Goembel v. Arnett*, 100 Ill. 34; *Dormueil v. Ward*, 108 Ill. 216; *Gore v. Kramer*, 117 Ill. 176; *The D. C. & B. R. Mills v. Ledwige*, 162 Ill. 305; *Ladd v. Judson*, 174 Ill. 344.

It is argued that because the proceeding here involved the appointment of a receiver, as provided for by section 25, in question, therefore the court might reach and subject to the possession of the receiver all such equitable assets. But the receiver could not assert any right in equity in this behalf which could not be asserted by the general creditors or by the corporation itself. The corporation itself could not invoke the aid of a court of equity to that end, nor could an assignee of such corporation. *Bouton v. Dement*, 123 Ill. 142; *Ide v. Sayer*, 129 Ill. 230; *The Republic Life Ins. Co. v. Swigert*, 135 Ill. 150.

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To reach such assets is a right inuring to creditors only, and under our practice to only such creditors as have exhausted their remedy at law.

It follows from the conclusion reached by the court upon this question that it is unnecessary to discuss the evidence or to consider other points which are presented by the briefs in relation thereto.

The decree is reversed and the cause remanded.

Kate E. Herbert v. Louis Mueller.

1. CONSIDERATION—*Promise to Pay the Debt of Another.*—A consideration is necessary to an oral promise to pay the debt of another.

2. SAME—*Agreement to Forbear.*—An agreement to forbear proceedings at law or in equity, to enforce a well-founded claim, is a valid consideration for a promise. But this consideration fails if it is shown that the claim is wholly and certainly unsustainable at law or in equity.

3. HUSBAND AND WIFE—*When Debtor and Creditor.*—Where a wife loans money to her husband, her position in regard to him, as his creditor, is precisely the same in law as would have been that of any other creditor under the same or similar circumstances.

Assumpsit.—Trial in the Circuit Court of Cook County, on appeal from a justice of the peace; the Hon. RICHARD W. CLIFFORD, Judge, presiding. Finding and judgment for plaintiff; appeal by defendant. Heard in this court at the October term, 1898. Reversed and remanded. Opinion filed June 22, 1899.

Statement by the Court.—This is an appeal from a judgment in favor of appellee and against appellant, for the sum of \$45, rendered in the trial court on appeal from a justice of the peace. The cause was tried by the court, without a jury, by agreement of the parties.

Appellee testified that he was in the cigar business, and had dealings with Martin B. Herbert for two years, selling him cigars; that Herbert ran a saloon in 1893, and in the early part of that year owed the plaintiff \$60 for cigars; that he heard that Herbert had “skipped out” and left the

State; that he went to the saloon for the purpose of finding out how many of his cigars were still on hand; that he went behind the counter and counted the cigars in order to either swear out an attachment or replevin; that he found \$45 worth in his saloon; that he intended either to attach or replevy the goods; that Mrs. Herbert came in, and plaintiff told her of his intention to attach or replevy if he was not paid; that Mrs. Herbert told him to leave the cigars and she would see that he was paid; and that relying upon her promise, he left the cigars in her place.

Appellant testified that August 20, 1892, she loaned to Martin B. Herbert, her husband, \$4,900, which he borrowed for the purpose of purchasing a saloon from one Frank G. Kellner; that her husband purchased the saloon, and that after he had been running it about a year, she found that he was getting in debt and there was no prospect of his being able to pay her; that she asked him to give her a deed of the saloon, which he did August 21, 1893; that she then took possession of the saloon and kept it open for the purpose of selling it as soon as possible; that she knew nothing of the sale by appellee to her husband of any cigars; that appellee came to the saloon shortly after she had taken possession and asked her if he might take his cigars, and she told him that if she should permit every one to take goods who claimed that her husband owed him she would have nothing left, and also told appellee that her husband would undoubtedly pay him; that nothing was said about attachment, replevin, or any kind of lawsuit; that appellee did not, in the justice's court, claim or testify that she had promised to pay her husband's debt if he would not attach, nor did he ever so claim until the then trial; that after she sold the saloon appellee came to her house and asked her where her husband was, but said nothing to her about the debt; that she told him where her husband was, and he went to her husband and made a demand on him for payment.

Appellee produced and put in evidence five promissory notes, each of date August 20, 1892, made by her husband, payable to her order, four for \$1,000 each and one for \$900, payable respectively in one, two, three four and five years,

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with interest at six per cent per annum; also a paid check for \$4,200 of date August 24, 1892, drawn by appellant on the Bank of Commerce to the order of Frank G. Kellner, which appellant says was drawn to Kellner's order by her husband's request; also a bill of sale from her husband to her dated August 21, 1894, of the saloon, fixtures and stock. Appellant further testified that before drawing the check above mentioned she had advanced to her husband \$100 to pay Kellner on account.

Martin B. Herbert, appellant's husband, testified that he borrowed from his wife the money evidenced by the above-mentioned notes, and identified a receipt from Kellner reading as follows:

“CHICAGO, AUGUST 20, 1892.

Received of H. B. Herbert one hundred dollars (\$100) on account of sale of saloon No. 734 Larrabee St. Amount of sale \$4,400; balance to be paid when lease is transferred, which is \$4,300.

FRANK G. KELLNER.”

Witness further testified that after taking the above receipt he paid the balance of the purchase money of the saloon, and received from Kellner a bill of sale of the saloon, fixtures and stock, which he identified, and which was put in evidence. The witness further testified that he purchased stock with the balance remaining of the money loaned him by his wife, in excess of the amount paid for the saloon; that appellant never had anything to do with the saloon, and never was in it, before he made the bill of sale to her; that he, witness, had paid appellee \$5 at each of two different times, and yet owed \$55; that he was present at the trial in the justice's court, and that appellee did not then testify that appellant promised to pay the debt if appellee would not attach; that he merely testified on that occasion that he had called on appellant, and found his cigars in the place, and asked appellant if he might remove them, and she refused. The witness further testified that at the time appellee called at the saloon he, witness, had gone to Waukegan for a three days' absence on a hunting expedition.

The only evidence offered by appellee in rebuttal was that of William Benzing, who testified that he was present when appellee called at the saloon; that witness and appellee looked for appellee's cigars and found them; that appellee counted them, and then appellant and appellee went into a side room, but that he, witness, did not know what conversation occurred between them.

M. SALOMON, attorney for appellant.

FITCH & DUHA, attorneys for appellee.

MR. JUSTICE ADAMS delivered the opinion of the court.

The claim of appellee, plaintiff in the trial court, is based solely on his evidence that appellant promised that if he, appellee, would not attach or replevy the cigars, "she would see that he was paid." There is no evidence tending in the least to cast suspicion on the dealings between appellant and her husband; her loan to him of the money to purchase the saloon and stock, his purchase of the same in his own name with the money so loaned, his running in debt in the saloon business, and his bill of sale of the saloon and stock to appellant.

Appellant having loaned money to her husband, her position in regard to him, as his creditor, was precisely the same in law as would have been that of any other creditor under the same or similar circumstances. Rudershausen v. Atwood, 19 Ill. App. 58, and cases cited.

Appellee does not claim that he sold the cigars on appellant's credit, or that he had any dealings whatever with her. His language is, that he was in the cigar business; that he had been dealing with Martin B. Herbert for about two years, selling his cigars; that Martin B. Herbert ran a saloon at No. 221 Lincoln avenue, and that in the early part of the year 1893, he owed plaintiff \$60 for cigars that had been sold and delivered to him.

Appellee was the sole witness as to the alleged promise of appellant. She expressly denied that she made any such

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promise, or that she had any conversation with appellee about attachment, replevin, or any kind of lawsuit. She and her husband both testified that on the trial before the justice, appellee appeared as a witness, and did not testify or claim that appellant promised to pay, or see paid, her husband's debt, if appellee would not attach or replevy. Assuming this to be true, it is strongly corroborative of appellant's testimony that she did not so promise. If appellee testified before the justice that appellant so promised, this might have been easily proved, but appellee neither produced witnesses to prove it, nor did he himself testify, as he had ample opportunity to do, that he so testified before the justice. We are of opinion that the preponderance of the evidence was against appellee on the question of fact, viz., whether appellant promised as appellee claimed. But even though she did so promise, appellee can not recover. Appellee's testimony is that appellant came in and he told her of his intention to attach or replevy if he was not paid, and that she told him "to leave the cigars and she would see that he was paid." Assuming that this was an express promise of appellant to pay, which, to say the least, is doubtful, it was not in writing, and being a promise to pay the debt of another, a consideration was necessary to its validity. Appellee's counsel contend that, as between the parties, it was a compromise of a doubtful right, and this was a consideration sufficient to support the promise. But appellee claimed no right as against appellant. His claim was against her husband, and the question whether he could lawfully attach or replevy her property for her husband's debt was not at all doubtful. On the contrary, it was clear that he could not. "An agreement to forbear, for a time, proceedings at law or in equity, to enforce a well-founded claim, is a valid consideration for a promise. But this consideration fails if it be shown that the claim is wholly and certainly unsustainable at law or in equity," etc. 1 Pars. on Cont. (6th Ed.), 440-444; Heaps v. Dunham, 95 Ill. 583, citing 1 Chitty on Contracts, 35; Vehon v. Vehon, 70 Ill. App. 41.

We think it clear from the evidence that neither attachment nor replevin of any part of appellant's stock, for appellee's claim against her husband, could have been sustained. The judgment will be reversed.

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Mary A. Railton v. The People, etc.

1. **RECEIVER—Appointment, *Pendente Lite*.**—Courts have power to appoint a receiver *pendente lite*. They are not required to wait until after claimants to the property in dispute have gone through the process of demurring, pleading or answering the bill of complaint.

Creditor's Bill.—Appeal from the Superior Court of Cook County; the Hon. FARLIN Q. BALL, Judge, presiding. Heard in this court at the October term, 1898. Affirmed. Opinion filed June 22, 1899.

Statement.—A creditor's bill was filed on January 7, 1898, by parties not here concerned, against one Ellinger, judgment debtor, which was afterward amended to make appellant a party defendant, and by which the property here involved was sought to be subjected to the satisfaction of the judgment against Ellinger. It was alleged that the property had been conveyed by Ellinger to appellant without any consideration, and that it was equitably the property of Ellinger, the judgment debtor.

On February 23, 1898, and before appellant had been served with process in the suit, a receiver was appointed for the property in general of Ellinger. Appellant claimed title to the property in question by conveyance from Ellinger. On April 22, 1898, an order was entered extending the receivership to the property in question. Appellant was served with process on the same date, April 22, 1898, and it appears from the record that she was present in court when the order of April 22, 1898, was entered, and that upon the hearing then had, her testimony was taken. The order recites that it is based upon her testimony and that of Ellinger, and affidavits.

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On May 6, 1898, an order was entered requiring appellant to show cause why she should not be attached for contempt of court.

On May 7, 1898, it was ordered that appellant be fined in the sum of \$100 for failure to obey the order of April 22, 1898, because of her interference with the possession of the receiver.

From this last order the appeal here is prosecuted.

MOSES SALOMON, attorney for appellant.

MR. JUSTICE SEARS delivered the opinion of the court.

The only question raised by the briefs of counsel for appellant is as to the jurisdiction of the Superior Court to empower that court to enter and enforce the order of April 22, 1898. All other assignments of error are abandoned by the limitation of the briefs filed.

It is urged in effect that because the appellant was only served with process on April 22, 1898, and the return term of court, at which she was obliged to appear and defend, had not yet arrived when the order of April 22, 1898, was entered, therefore that order was entered by the court when it had no jurisdictional power to control appellant's property, and, as to her, it was null and of no effect. It is contended that no adjudication of the rights of appellant could be had until she had been not only made a party to the proceeding, but as well had her day in court to be heard in defense of her rights.

Counsel confuse the interlocutory control of the property, by appointment of a receiver *pendente lite*, with a final order determinative of the rights of the litigants. It is true that the interests of appellant could not be finally disposed of in this suit until she had been given her right to be heard in defense. But here there is no final adjudication. The court merely sought by its interlocutory order to preserve the estate until a final determination might be had. When the order extending the receivership to include this property was entered, appellant had not only been served with process, but the record shows that she was

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present in court, and that her testimony was taken. That testimony is not here set forth by the record. We are to presume that it was such as made the order a proper one.

We can not assent to the contention of counsel that the court was powerless to appoint a receiver *pendente lite* until after the appellant, claimant of the property, had gone through the procedure of demurring or pleading to or answering the bill of complaint. Such a holding would make interlocutory orders appointing receivers *pendente lite* impossible, for after the answer or plea, the same reasoning would require a waiting for final adjudication.

The court had power to act. The propriety of the order, if there was power, is not questioned. No appeal was prosecuted from the original order appointing the receiver, or from the later order extending the scope of the receivership. This appeal is from the order punishing appellant for contempt of the court in disregarding that order. It is not contended that the order was improper if the court had the power to act. The order is affirmed.

**James Viles, Edward F. Robbins and James Viles, Jr.,
v. Albert Stantesky.**

1. **RES IPSA LOQUITUR—Application of the Doctrine.**—The doctrine of *res ipsa loquitur* applies only in actions for injury by negligence where no proof of negligence is required beyond the accident itself, which is such as necessarily to involve negligence.

2. **PERSONAL INJURIES—Master and Servant—Requisites of the Proof.**—When a servant seeks to recover damages of his master for a personal injury, resulting from defects in the machinery of an elevator furnished for his use, the burden of proving the negligence alleged rests upon the servant. Mere proof of the accident or injury does not shift the burden of proof on the master, and require him to show that the injury did not result from his negligence.

Action in Case, for personal injuries. Trial in the Superior Court of Cook County; the Hon. JOHN BARTON PAYNE, Judge, presiding. Verdict and judgment for plaintiff; appeal by defendants. Heard in the Branch Appellate Court at the October term, 1898. Reversed and remanded on rehearing. Mr. Justice SHEPARD dissenting. Opinion filed July 11, 1899.

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Statement.—May 24, 1895, appellee was in the employ of appellants. He was in charge of and operating what is called a hand elevator. The only force or power used or applied, aside from gravitation, was that of a man or of men by pulling a rope. This elevator ran but one story, that is, from the first or ground floor to the second floor. At the time when appellee was injured he ran the elevator up to the second floor and there stopped it even with that floor. He then loaded it. He says that as he stepped onto it the elevator started down. In some unexplained manner, and before the elevator reached the first floor, the appellee was out onto the first floor with his leg under the elevator so that it was caught and injured by the elevator as it reached that floor. That was between three and four o'clock P. M. After that time, and up to five o'clock, the elevator was used and operated by other employes of appellants. Appellee had been in the employ of appellants in and about the premises and the elevator most of the time for some fifteen years. He had been in the immediate charge of and been operating the elevator from the 14th day of May to the day he was injured. The elevator was used continuously thereafter and without repair, so far as this record shows.

The jury returned a verdict against appellants for the sum of \$4,235. Appellee having remitted the sum of \$1,735, the trial court overruled the motion for a new trial and entered judgment for \$2,500. There are some contested questions of fact to which reference will be made in the opinion following.

JOHN A. POST and O. W. DYNES, attorneys for appellants; CHARLES B. STAFFORD, of counsel.

JONES & LUSK, attorneys for appellee.

MR. JUSTICE HORTON delivered the opinion of the court. Appellee was injured by having his leg caught under a loaded hand elevator while he was in the employ of appellants. As stated in argument by appellee's counsel, "The

declaration alleges unsafe and insecure construction—and unsafe condition and repair" of said elevator. There is no other charge in the declaration upon which to base a recovery.

There is no testimony which would warrant a recovery upon the averment as to the alleged "unsafe and insecure construction" of said elevator. It had been constructed and in use in the same place during all the time appellee had worked there. No one testifies that the elevator was unsafe and insecure in its construction. Neither does any one testify that appellee was injured by reason of its faulty construction.

If, then, appellee is entitled to recover upon the declaration in this case, it must be because of the "unsafe condition and repair" of the elevator in question. Counsel for appellee contend that "the doctrine of *res ipsa loquitur* applies." Bouvier, after giving the translation of this Latin quotation as "the thing speaks for itself," says it is "a phrase often used in actions for injury by negligence when no proof of negligence is required beyond the accident itself, which is such as necessarily to involve negligence."

It will not be contended that this is a case in which "no proof of negligence is required beyond the accident itself."

In Wabash R. R. Co. v. Farrell, Legal News, February 4, 1899, p. 199, the rule is very clearly stated as follows:

"When a servant seeks to recover damages of his master for a personal injury resulting from defects in the machinery of a car furnished for use, the burden of proving the negligence alleged rests upon the servant. Mere proof of the accident or injury does not shift the burden of proof on the master and require him to show that the injury did not result from his negligence."

It is difficult to discover from appellee's own testimony, or from all the testimony in the case, whether there was negligence, and if so, whose negligence caused the injury. Appellee says that he ran the elevator up to the second floor, loaded it, stepped onto it with a truck in his hand, "and" (using his language) "at the same moment something broke

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and the elevator fell right down." If he means to say that some part of the elevator broke, we will only say that the testimony shows beyond question that he is mistaken.

Appellee says that the truck which he held in his hand pulled him down and he fell; that the elevator was standing still, even with the floor, when he stepped onto it, and that "it just come down very fast." It is stated that the second floor is fifteen feet above the lower floor. The second floor, with the joists and supports, must have occupied, say one foot, so that to have an opening four feet in length this elevator must have gone down five feet. If the appellee fell or jumped from the elevator at that point, the elevator had ten feet further to run and the appellee had the same distance to fall. At whatever point appellee jumped or fell from the elevator, he and the elevator had the same distance to go to reach the first floor. He says that "as the truck fell down and pulled me down, I must have come down quicker than the elevator dropped, and as there was a space under the elevator, my leg must have gotten there." He would not fall any faster than a loaded elevator car would if it were unchecked and unrestrained. This elevator car, with its load, could not have been freed from restraint as it would have been if the connections had broken. It can not be that "it came down very fast," as stated by appellee. If so, it would have been a physical impossibility for appellee to have got his foot under it in the manner described.

It does not appear that the appellants, or either of them, or any persons other than fellow-servants were present when the elevator fell or after appellee run it to the second floor and before it fell. One witness testified that there was another man on the elevator with appellee at the time appellee was injured; also, that appellee jumped off the elevator. This is denied by appellee. If there was another man, then he may have pulled the rope and started the elevator car.

It also appears in the testimony that there was nothing broken about the elevator; that it was used after the same

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day without repairs, and that no repairs were needed. In the examination of appellee these questions and answers appear, viz.:

Q. "Do you know what started the elevator?" A. "I don't know; I can not tell. I could not tell when it fell with me what happened."

Q. "Did you ever find out what made the elevator fall?" A. "No."

We are at a loss to discover wherein negligence can be imputed to appellants. This is not a case in which the doctrine of *res ipsa loquitur* should be applied. For a discussion of this doctrine see Albany Law Journal, January 21, 1899, p. 145, and 10 Central Law Journal, p. 261, and cases cited.

The testimony does not sustain the averment of the declaration as to any "unsafe condition and repair" of the elevator. There can be no recovery unless that averment is sustained. As between the appellee and appellants, the injury to appellee must be regarded as an accident rather than as the result of negligence for which appellants are responsible.

The judgment of the Superior Court is reversed and the cause remanded.

MR. PRESIDING JUSTICE FREEMAN.

Upon the petition for rehearing, I concur in the result, although I do not fully agree with the reasoning of the foregoing opinion. The judgment of the Superior Court is therefore reversed and the cause remanded.

Mr. Justice SHEPARD dissents.

West Chicago Street R. R. Co. v. Frederick Wizemann.

1. **CONFLICTING EVIDENCE—*Instructions.***—Where there is a conflict in the evidence the instructions should be accurate.

2. **INSTRUCTIONS—*Erroneous.***—An instruction which imposes a much greater duty than that required by law is erroneous.

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3. SAME—*Erroneous, When Not Cured by Others.*—An erroneous instruction, when it bears on a vital question, can not be cured by any other instruction given, because the jury may have acted on it regardless of other instructions.

Action in Case, for personal injuries. Trial in the Superior Court of Cook County; the Hon. JOSEPH E. GARY, Judge, presiding. Verdict and judgment for plaintiff; appeal by defendant. Heard in this court at the October term, 1898. Reversed and remanded. Opinion filed June 22, 1899.

ALEXANDER SULLIVAN, attorney for appellant; EDWARD J. McARDLE, of counsel.

GEMMILL, BARNHART & FOELL, attorneys for appellee.

MR. JUSTICE ADAMS delivered the opinion of the court.

Appellee was driving a team of horses hitched to an empty coal wagon west on the car track of appellant in North avenue, in the city of Chicago, when a street car of appellant, operated by electricity and following the wagon, collided with it and injured appellee, and appellee brought suit, alleging negligence of appellant in operating its cars, and recovered judgment for \$4,000. There was a serious conflict in the evidence in relation to certain matters bearing materially on the questions of the care exercised by appellee and appellant's negligence. Such being the case, the instructions should have been accurate. Railroad Co. v. Cline, 135 Ill. 43, 48; C. C. Ry. Co. v. Canevin; 72 Ill. App. 82.

Numerous other cases are to the same effect.

The court gave to the jury, at appellee's request, this instruction:

"The jury are instructed as a matter of law that a street car company, operating cars upon its track, laid in the public streets of the city of Chicago, does not have the exclusive right of travel upon such tracks or upon that portion of the street covered by the tracks, but that vehicles of all kinds are entitled to general use of the highways and have a right to travel across or along and upon such car tracks; all being required to exercise ordinary care to avoid injury to themselves and to others; and if the jury believe from the evi-

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dence in this case that at the time of the injury complained of the plaintiff was driving a team, hitched to a wagon, along the public highway, known as North avenue, in the city of Chicago, and in the track owned and used by the defendant company, *then you are instructed that it was the duty of the defendant company to exercise such care in managing its said cars being so operated as would prevent accident or injury to the plaintiff, if you find from the evidence that the plaintiff was without negligence on his part.*"

The part of the instruction italicized imposed on appellant a much greater duty than that required by law. Appellee was not a passenger on appellant's car, but a traveler on its track, on the public highway, and his relation to appellant was that of a stranger. Therefore, the only duty which appellant owed him was to exercise ordinary care. But the instruction informed the jury that it was appellant's duty to exercise such care in managing its cars as would prevent accident or injury to appellee, provided appellee himself was free from negligence. Following this instruction the jury, if they believed that appellee exercised ordinary care, must have found for appellee, because there was a collision and also consequent injury to appellee. Under the instruction, if appellee was exercising ordinary care, and a collision and consequent injury occurred, the jury might have found the appellant guilty, notwithstanding it may have exercised the highest degree of care consistent with the practical operation of the road.

The instruction, bearing as it did on a vital question, namely, the care which it was incumbent on the appellant to exercise, could not be cured by any other instruction given, because the jury may have acted on it, regardless of other instructions. The judgment will be reversed and the cause remanded.

Elgin City Banking Co. v. Center.

Elgin City Banking Co. v. Minnie Center.

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1. **ASSIGNMENT—Note Secured by a Mortgage.**—The assignment of a note, secured by a mortgage before the maturity of the note, passes the mortgage also as an incident of the debt, and the assignee takes all the rights of the mortgagee.

2. **NOTICE—Construction Sec. 31, Ch. 30, R. S.**—Section 31 of Chapter 30, R. S., entitled “Conveyances,” providing that instruments of writing relating to real estate, shall be deemed, from the time of being filed for record, notice to subsequent purchasers and creditors, though not acknowledged or proven according to law, takes the place of actual notice to an assignee of a subsequent mortgage, and it is his duty to examine the record of prior mortgages and their recitals securing negotiable notes not due and liable to be outstanding in the hands of the innocent holders for value, and ascertain the truth of these matters.

3. **DEEDS—Construction of.**—In construing a deed, courts will look not only to the words of the deed, but also to the circumstances and condition of the parties as they existed at the time of the execution of the deed.

Foreclosure.—Trial in the Circuit Court of Cook County; the Hon. EDMUND W. BURKE, Judge, presiding. Decree for complainant; appeal by defendant. Heard in this court at the October term, 1898. Reversed and remanded, with directions. Opinion filed June 22, 1899.

Statement.—Appellant, in the usual course of business, June 23, 1892, purchased of Roland L. Morgan, paying therefor the face value and accrued interest, a note of \$1,100, made by Henry Rother, dated March 30, 1892, payable to Morgan, due on or before three years after date, with interest at seven per cent per annum, payable semi-annually, and which note was secured by a mortgage of the same date to Morgan made by Rother, the owner of the fee of the premises in question in this case, being a lot in Villa Park, Cook county, Illinois, and which was recorded April 22, 1892. The note was assigned and guaranteed by Morgan to appellant, and delivered with the mortgage to appellant at the time of the purchase, but no formal assignment of the mortgage was then made. Said note and mortgage have, ever since said purchase, been held and owned by

appellant. Thereafter Rother conveyed said lot to one Crowley, who, on May 1, 1894, conveyed to Emma L. Morgan, wife of said Roland L. Morgan. Crowley and wife, April 1, 1893, made and delivered a trust deed to the Commercial Loan & Trust Company, which was recorded May 4, 1893, to secure a note of \$2,240, payable to the North & South Building & Loan Association, which was subsequently released by a release dated May 1, 1894, and recorded May 3, 1894.

May 2, 1894, Emma L. Morgan and Roland L. Morgan, her husband, made and delivered to James F. Rogers their mortgage of that date, conveying said lot to said Rogers to secure their note of even date for \$1,000, due in three years from date, with interest at seven per cent per annum, payable semi-annually. This mortgage has the following recital, to wit: "This indenture, etc., that the mortgagor, Emma L. Morgan, and Roland L. Morgan (her husband), of, etc., mortgage and warrant to James F. Rogers, of, etc., to secure payment of one certain promissory note executed by Emma L. Morgan and Roland L. Morgan (her husband)," etc., and is acknowledged by "Emma L. Morgan and Roland L. Morgan, her husband," in the usual form, releasing and waiving the right of homestead. The note secured by the mortgage is worded in part, viz.: "Three years after date, for value received I promise to pay to the order of James F. Rogers," etc. May 5, 1894, Rogers, by a separate formal instrument, assigned the last mentioned mortgage to appellee, Minnie Center, which assignment was recorded May 31, 1894, and also, by indorsement in blank, assigned to said Center the note secured by said mortgage. Rogers paid no consideration for this note and mortgage, and Minnie Center paid him nothing for them nor for said assignment, but the note, mortgage and assignment passed from said Morgans through their agent to Center, she paying therefor the sum of \$1,000 to the North & South Building & Loan Association, in consideration that the association would cause to be released the said trust deed to the Commercial Loan & Trust Company, which was done by release

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dated May 1, 1894, and recorded May 4, 1894, mentioned above.

One Sills, who acted for the Morgans in the transaction by which Center purchased the Rogers note and mortgage, stated to the agent of Center, speaking of this mortgagee, "it is a first mortgage, and good; the Morgans are good without a mortgage." He also was the agent of the building association.

There is no evidence that appellee, or her agent, or Rogers, had any actual notice of the existence of appellant's mortgage at the time she purchased the Rogers mortgage. It does not appear that she, or any one for her, made any examination of the title to the lot or of the records, to ascertain whether there were any outstanding liens upon it.

July 14, 1894, Roland L. Morgan made and delivered to appellant a formal written assignment of appellant's said mortgage, which was recorded July 18, 1894, and contains as part of the clause assigning the mortgage the following words, to wit: "Together with the note therein described and the money due or to grow due thereon, with the interest," etc. Appellee filed her bill to foreclose the Rogers mortgage for default in payment of interest, by reason of which the principal was declared to be due, making appellant and others parties and claiming a first lien on the lot. Appellant answered and filed its cross-bill to foreclose its mortgage and claiming it to be a first lien. After the issues were made the cause was referred to a master to take proof and report his conclusions, which was done, the master reporting, in substance, the facts above stated, and recommending a decree making appellant's mortgage a first lien and appellee's mortgage a second lien on said lot, and for a sale to satisfy the same.

Upon a hearing of exceptions to the master's report before the chancellor, the report was approved and confirmed in all respects, except that appellant's mortgage was made a second and appellee's mortgage a first lien on said lot, and a decree was entered accordingly, from which this appeal is taken.

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BOTSFORD, WAYNE & BOTSFORD and CUTTING, CASTLE & WILLIAMS, attorneys for appellant.

The assignment of a note before maturity, secured by a mortgage, passes the mortgage also, as an incident of the debt. Sargent v. Howe, 21 Ill. 148; Kleeman v. Frisbie, 63 Ill. 482; Union Mutual Life Ins. Co. v. Slee, 123 Ill. 57.

Where a mortgagee obtains a conveyance of the premises of the mortgagor, it may or may not operate as a release of the mortgage. The intention of the parties is what governs and controls. Edgerton v. Young, 43 Ill. 464; Huebsch v. Scheel, 81 Ill. 281.

A release of a mortgage may, or may not operate as a release; it depends on the circumstances under which the same were executed. Turpin v. Ogle, 4 Ill. App. 611; Keohane v. Smith, 6 Ill. App. 585; Keohane v. Smith, 97 Ill. 156.

Where one of two innocent persons must suffer, he who by his negligent conduct made it possible for the loss to occur must bear it. Anderson v. Warne, 71 Ill. 20.

A wife joining in her husband's deed to release her right of dower is not bound by the covenants of warranty therein. Sanford v. Kane, 133 Ill. 206; Strawn v. Strawn, 50 Ill. 33.

HEATH, CARNAHAN & STOLL and HECKMAN, ELSDON & SHAW, attorneys for appellee.

No precise formality is necessary in making a release of a mortgage. It may be effected by a reconveyance even where the only provision by statute is for a release on the margin, or it may be effected by a quit-claim deed from the mortgagee to the mortgagor, or to his grantee or mortgagee (1 Jones, Mortgages, Sec. 972; Waters v. Waters, 20 Iowa, 363; Allen v. Leominster Savings Bank, 130 Mass. 580); or by a subsequent mortgage made by the mortgagee after taking a conveyance of the premises, and after an unrecorded assignment of the prior mortgage had been made to a third party (McCormick v. Bauer, 122 Ill. 573); or even by a bond made by a mortgagee, conditioned that a third person should save the one to whom such bond was given

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"harmless from cost and damages in consequence of any incumbrance" on the land. *Proctor v. Thrall*, 22 Vt. 262.

And a quit-claim deed has repeatedly been held to be not only a release but a conveyance of whatever estate the grantor has; and it implies that he has an estate to convey. *Robinson v. Appleton*, 22 Ill. App. 351; *Butterfield v. Smith*, 11 Ill. 485; *Morgan v. Clayton*, 61 Ill. 35; *Brady v. Spurck*, 27 Ill. 478; *Grant v. Bennett*, 96 Ill. 513; *Brown v. Banner Coal & Coal Oil Co.*, 97 Ill. 214; *Sanford v. Kane*, 133 Ill. 206.

Where the covenants in a deed are not restricted to one of the parties, they are the covenants of all the parties executing the deed. *L. E. & W. R. R. Co. v. Whitham*, 155 Ill. 514; *Miller v. Shaw*. 103 Ill. 277.

A deed in due form, executed by a person *sui juris*, will pass whatever estate, title or interest a grantor has. And where there is nothing to show the contrary, it will be presumed that both the legal and equitable title pass to the grantee. *Donlin v. Bradley*, 119 Ill. 412; 1 Jones, Mortgages, Sec. 972.

The assignee of a mortgage is bound to record an assignment if he would be protected, and if he fails so to do and such mortgage is released by the mortgagee of record after he has made such an assignment of it and the note secured thereby, such release is valid and binding on such assignee, and he is estopped thereby so far as the rights of the third persons who deal with the property in good faith and without notice, are concerned. *Ogle v. Turpin*, 102 Ill. 148; *Howard v. Ross*, 5 Ill. App. 456; *Smith v. Keohane*, 6 Ill. App. 585; 1 Jones, Mortgages, Secs. 476, 479 and 482; *Edgerton v. Young*, 43 Ill. 464; *McCormick v. Bauer*, 122 Ill. 573.

MR. PRESIDING JUSTICE WINDES, after making the foregoing statement, delivered the opinion of the court.

Counsel for appellee say :

"The sole question in this case is whether the execution by Roland L. Morgan of the mortgage of appellee, Minnie

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Center, containing full covenants of warranty, operated as a release of appellant's mortgage and precluded the said Roland L. Morgan, and consequently his secret assignee (the appellant), from afterward setting up such mortgage as a lien superior to that acquired by appellee's mortgage."

It is the law, and is conceded by appellee's counsel, that the assignment of a note secured by a mortgage before maturity passes the mortgage also as an incident of the debt. The assignee takes all the rights of the assignor, the mortgagee. *Union Mut. Life Ins. Co. v. Slee*, 123 Ill. 57-93; *Sargent v. Morgan*, 21 Ill. 148.

From this principle it follows that appellant, by the indorsement, assignment and delivery to it of the Rothers note on June 23, 1892, became the equitable owner of the mortgage securing the same, and is entitled to a superior lien to that of the Rogers mortgage, which is its junior in date and date of record, unless it is debarred because of its failure to secure and place upon record an assignment of its mortgage before appellee acquired her mortgage and placed an assignment thereof on record. Appellee contends that as the assignment of the note (and consequent equitable assignment of the mortgage) was unaccompanied by a transfer of record of the mortgage, it is good only between the parties themselves or persons having actual notice thereof.

It is not claimed, and, as we have seen, there is no evidence, that appellee had actual notice of the Rothers mortgage, and therefore it is only necessary to consider whether, under the facts of this case, appellee is in law chargeable with notice of its record.

In *Keohane v. Smith*, 97 Ill. 156-9, the Supreme Court, in speaking of the rights of a second mortgagee who knew of the existence of the first mortgage, as against those of the holder of the first mortgage, which was released of record by the mortgagee after he had assigned the note secured by it, said, referring to the first mortgage:

"It described the note, and from the description contained in the mortgage, he must be held to have had notice that the note secured was not due. Being negotiable paper, he must have known it might have been assigned in the usual

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course of business, and might then be in the hands of an innocent holder for value. Under the circumstances it was his duty to have informed himself whether the outstanding note the mortgage secured had in fact been paid. Not to do so made it possible for the mortgagee to practice a fraud on the assignee of the note. Knowing the note was not due, and would not be due for years to come, he ought to have inquired whether Runyan (the first mortgagee) was still the holder and could rightfully receive payment, and not to do so was gross carelessness."

Our Statute (Hurd's R. S., 1897), Ch. 30, Sec. 31, provides, viz.:

"Deeds, mortgages and other instruments of writing relating to real estate, shall be deemed, from time of being filed for record, notice to subsequent purchasers and creditors, though not acknowledged or proven, according to law."

This statute, in our opinion, takes the place of actual notice to appellee, and makes applicable to the case at bar the language of the court in the Keohane case, *supra*, and it was the duty of appellee—as she must take notice of the record of appellant's mortgage and its recitals that it secured a negotiable note which was not due for almost one year after her purchase of the Rogers mortgage, and that it was liable to be outstanding in the hands of an innocent holder for value—to ascertain whether those matters were true or not. She should have informed herself of all facts disclosed by the record of appellant's mortgage, and as to whether the note secured by the mortgage had in fact been paid, or whether it was held by some innocent third person for value. No diligence on her part is shown. She did not, nor did any one for her, make an examination of the records. She was not justified in relying on the statement of the Morgans' agent, who was also the agent of the building association, and on its behalf interested in getting her money on its second mortgage to the Commercial Loan & Trust Company, that the Rogers mortgage was a first mortgage, any more than the second mortgagee was entitled to rely on Runyan's release in the Keohane case, *supra*.

Appellee seems to rely especially on the case of Ogle v.

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Turpin, 102 Ill. 148, and claims that because appellant did not take an assignment of its mortgage and record it, before her assignment of the Rogers mortgage was recorded, it is not entitled to protection. We think this case is clearly distinguishable from the case at bar, in that the first mortgage was released by the mortgagee, who had acquired and held the equity of redemption. This release was of record when the second mortgage was taken, and the second mortgagee had a right to rely on the record of this release under these circumstances. Not so in the case at bar, in which there was no merger of title and no release of record.

The claim that because the Rogers mortgage contained full covenants of warranty on the part of Roland L. Morgan, the mortgagee in appellant's mortgage, it operated as a release and precluded Morgan and consequently appellant, his assignee, from setting up a lien superior to that of appellee, is not, in our opinion, tenable. If it were conceded that under this mortgage Morgan warranted the title of the lot to be free and clear of all incumbrances, we are not prepared to hold that it could have any other or greater effect than his formal release of the mortgage could have had, which, as we have seen in the Keohane case, *supra*, the Supreme Court held had no effect on the first mortgage. We do not, however, think that the covenants in the Rogers mortgage were the covenants of Roland L. Morgan. He merely joined in the mortgage, as we think is apparent from an examination of it, as husband, for the purpose of releasing his inchoate dower and right of homestead.

The mortgage says "the mortgagor, Emma L. Morgan, and Roland L. Morgan (her husband)," mortgage and warrant, etc. The fact that the verbs are plural can not overcome the statement that the mortgagor is Emma L. Morgan. She owned the fee; her husband only had an inchoate dower right and homestead. In equity he had no mortgage title. In construing the deed the court will look not only to the words of the deed, but also to the circumstances and condition of the parties as they existed at the time the deed was made, and when they are considered we think it apparent

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that the covenants are those of Emma L. Morgan alone. Hadden v. Shoutz, 15 Ill. 581; Piper v. Connelly, 108 Ill. 651, and cases cited.

In Sanford v. Kane, 133 Ill. 199–206, it was held that where a wife joined with her husband in a conveyance of his land she was not barred by the covenants of warranty contained in the deed, and the court said that in determining the question equity “will look beyond the mere form and into the substance of the transaction, and give effect to the contracts of parties according to the true intent and meaning which the parties themselves understood and attached to them at the time they were made.”

To a like effect in principle are Strawn v. Strawn, 50 Ill. 33, and R. R. Co. v. Whitham, 155 Ill. 520, in the latter of which cases the deed was by Hutchinson and Harriet M. Hutchinson, his wife. The title was in the wife, and it was contended that she only joined to waive her dower and she did not convey her estate, but the court held that she conveyed her estate. The deed was construed according to the intention of the parties and the circumstances at the time it was made. Under our statute the rights of the husband as to dower and homestead in his wife's lands are the same as those of the wife in the husband's lands.

But aside from the matter of its covenants, we can not think, from the evidence in this case, it was intended that the Rogers mortgage should operate as a release of appellant's mortgage. The appellee and her agent had no actual knowledge of appellant's mortgage, so far as the evidence shows. If they had actual notice they were bound to see that appellant's note was paid. (Keohane case, *supra*.) A release, however formal, would not avail them. If they thought a release was necessary, it was an easy matter to have had one prepared and executed at the same time the mortgage was made. Also the fact that several months after the purchase appellee procured a release of appellant's mortgage, is strong evidence that the Rogers mortgage was not intended by the parties to be a release.

The claim of appellee that appellant is estopped by the

recitals contained in the assignment of its mortgage taken after the assignment of the Rogers mortgage to appellee, to the effect that the note was then assigned and that appellant can not now claim that the note was assigned to it June 23, 1892, at the time of the purchase, is not, in our opinion, tenable. The rights of appellant were in equity acquired June 23, 1892, and appellee did no act which was based on the faith of this recital. Moreover the words of the assignment are, "have granted, bargained, sold, assigned, transferred and set over, and by these presents do grant, bargain," etc., and are not inconsistent with the proof that the note was in fact assigned on June 23, 1892.

We are of opinion that appellant is entitled to a first lien and appellee to a second lien on the lot in question.

The decree is reversed and the cause remanded, with directions to the Circuit Court of Cook County to enter a decree in accordance with the recommendations of the master and with the views herein expressed. Reversed and remanded with directions.

Samuel C. Postlewait v. L. L. Higby.

1. **BURDEN OF PROOF—On Affirmative and Negative Questions.**—One who asserts a fact necessary to establish a claim or a defense, must prove it. In the great majority of cases it will be found that the fact to be proved is affirmative in form, and whoever asserts a claim or a defense which depends upon a negative must, as in other cases, establish the truth of the negative by a preponderance of evidence.

2. **SAME—Affirmative of the Issue.**—The affirmative of the issue is with him who affirms or asserts a matter in support of his claim or defense, regardless of whether he affirms or asserts the affirmative or negative of the question at issue.

3. **SAME—Where a party litigant claims that his adversary has no such arrangement as he relies upon and so insists as matter of defense, it is incumbent on him to prove his claim.**

4. **SAME—Rests Throughout upon the Party Asserting the Affirmative of the Issue.**—Generally speaking, the burden of proof, in the sense of the duty of producing evidence, passes from party to party as the case

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progresses, while the burden of proof, meaning the obligation to establish the truth of the claim, rests throughout upon the party asserting the affirmative of the issue, and unless he meets this obligation upon the whole case, he fails. This burden of proof never shifts during the course of a trial, but remains with him to the end.

Assumpsit, on a contract. Appeal from the Superior Court of Cook County; the Hon. JOHN BARTON PAYNE, Judge, presiding. Heard in this court at the October term, 1898. Affirmed. Opinion filed June 22, 1899.

Statement by the Court.—This was an action of assumpsit on a contract, which, with the indorsements thereon, was put in evidence, and is as follows:

“No. 11,248. \$420.

CHICAGO, ILL., 6-20, 1892.

The Unique Printing Co. is hereby requested to publish our card, to occupy $\frac{1}{2}$ square on 5000 ‘Rules, Regulations and Law Banners,’ for one year’s use in thirty hotels (same rate for fewer) of this city, the same to be of satin, with ornamental trimmings (style of sample displayed) for which we promise to pay the bearer the sum of four hundred twenty dollars—\$35 upon producing the receipts showing the delivery of the banners as herein described—\$35 the 1st of each mo. thereafter till paid. All stipulations are detailed in this contract note, and we have received an exact duplicate.

S. C. Postlewait, name.

Ogden Ave. street.

Undertaker. business.

A square is 1 inch deep by $5\frac{1}{2}$ inches wide. Special location of ad. can not be made a part of the contract, and no ad. to occupy more than one square.

Taken by E. L. Peet, representing the Unique Printing Co., Fort Worth, Texas.

Hotel receipts submitted Decr. 10, '92.

S. C. POSTLEWAIT. (Name.)

ENDORSEMENTS.—Paid o. d. (on delivery) Dec. 10, 1892, \$35.00. Paid 2d payment Jan. 30, 1893, \$35.00. Paid 3d payment March 18, 1893, \$35.00.”

The declaration consists of a special count and the common *indebitatus* counts in assumpsit.

In the special count the instrument sued on is declared on as a promissory note, which it clearly is not. The

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appellee filed with his declaration an affidavit of claim, claiming on the above quoted instrument, calling it a promissory note and alleging there was due on it a balance of \$350.81. Appellant filed a plea of the general issue and an affidavit of merits, and also a notice under the plea which is as follows:

“Notice of special matter under the general issue: That the instrument in writing, a copy of which is filed with the plaintiff's amended declaration, was given upon another and a different consideration than the consideration expressed upon the face of said instrument, and that the said instrument was obtained from the defendant by a certain false and fraudulent representation, to wit, that said Unique Printing Company obtained the making and delivery of said instrument by the defendant, by falsely and fraudulently representing to the defendant that the said Unique Printing Company had, at and before the execution of said instrument, a contract with thirty of the leading hotels of Chicago that they (the said hotels), and each of them, would in case of the death of any person or persons in said hotels, respectively, promptly notify the undertaker whose name should appear on the banners mentioned in said instrument in writing, of the death of any such person or persons dying in said hotels, and, if possible, place the body of any and all such deceased person or persons in the charge and care of the undertaker whose advertisement should appear upon said banners. And that the defendant will give in evidence that said Unique Printing Company had no such contract with said thirty leading hotels, nor with either of them, and that said representation was knowingly false. And the defendant will further give in evidence that the said representations of, and said alleged contract with, said hotels was the principal and only consideration, except the consideration appearing on the face of said instrument, of the execution and delivery of said instrument, and that the execution and delivery of said instrument by the defendant was obtained by the false and fraudulent representations aforesaid, and is void, and the consideration of said instrument has wholly failed.”

The cause, by consent of the parties, was tried by the court without a jury; the court found the issues for the plaintiff, appellee, and assessed the damages at the sum of \$391.34, for which sum judgment was rendered. L. L. Higby,

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the appellee, did business in the name of the Unique Printing Co. He was the company. There was no incorporated company of that name. The instrument sued on was put in evidence under the common counts, the court having properly ruled that it was inadmissible under the special count.

Brant, attorney for appellee, testified that he called on appellant, presented the written instrument to him, and asked him whether the signature to the instrument and also the signature to the memorandum, "Hotel receipts submitted," etc., were his, and he said they were; that the work had been done and the banner receipts had been submitted to him, but that he would not pay because certain representations had been made to him about contracts which the company had with the hotels which were untrue, and that he had received no benefit from the contract.

Appellant testified that he was an undertaker; that a Mrs. Peet, who was soliciting agent for the company, called on him and solicited his advertisement in the "Rules and Regulations," to be placed inside of hotel room doors, and said to him, "We have an arrangement with thirty leading hotels of Chicago, with one exception, by which they are to call the undertaker whose name appears on these 'Rules and Regulations,' in all cases of death during the year while these hang upon the hotel doors;" that on the strength of that representation, he signed the order; that he made three payments aggregating \$105, when, having begun to suspect that something was wrong, he sent two men, one at a time, to investigate, who reported to him, and that after receiving their reports he stopped paying. The witness admitted that he stated to Brant that the signature to the instrument was his, and that the articles had been delivered to the hotels; that Mrs. Peet had satisfied him that they had been delivered some time in 1892. Plattner, formerly in appellant's employ, testified that Mrs. Peet called at appellant's place of business, when appellant was absent, and said to witness that she had an advertising scheme by which she intended to put advertising on the banners to be placed in

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thirty leading hotels, with one exception, but that witness knew nothing of what occurred between her and appellant. Appellant proved that the banners were not used at the Briggs House or at the Sherman House, and that neither of said hotels had any contract with the Unique Printing Co. John Mullin, a witness for appellant, testified as follows:

"I am a clerk for Mr. Postlewait; been with him about a year; I have made efforts and inquiry among the hotels in this city to ascertain whether or not the banners mentioned in this instrument were put in the hotels; I was at the Tremont, Sherman, Briggs, Great Northern and Gault House; I ascertained that there was a banner at the Great Northern; it did not bear Mr. Postlewait's name on it; I saw one at the Tremont, but I did not see his name on it; I don't know whether it was on or not; I found none at any of the other hotels; I made inquiry as to whether or not they had made a contract in relation to such banners; they universally said no such contract was made."

There was no evidence that any of the hotels mentioned, except the Briggs House, was a leading hotel.

JONES & LUSK, attorneys for appellant.

HENRY W. BRANT, attorney for appellee.

MR. JUSTICE ADAMS delivered the opinion of the court.

The main contention of appellant's counsel is, that appellant having proved that appellant's solicitor represented to him that appellee had an arrangement with thirty leading hotels in Chicago, as mentioned in the foregoing statement, the burden was on appellee to prove that he had such an arrangement, and not on appellant to prove the contrary, viz., that appellant had no such arrangement; that appellant was not bound to prove a negative. We do not understand that the burden of proof depends upon the form of a proposition, but that the burden is on him asserting the proposition, as a cause of action or as a defense, whether the proposition asserted is affirmative or negative in form. A recent author says:

"It is reasonable that the one who asserts a fact neces-

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sary to the claim or defense, should prove such fact, and in the great majority of cases it will be found that the fact to be proved is affirmative in form. But it is well settled that whoever asserts a claim or a defense which depends upon a negative must, as in other cases, establish the truth of the allegation by a preponderance of evidence." 1 Jones on Evidence, Sec. 178, citing numerous cases in support of the text.

The burden of proof is on him who has the affirmative of the issue, but there is an obvious distinction between the affirmative of the issue and the affirmative of the question. The affirmative of the issue is with him who affirms or asserts a matter in support of his claim or defense, regardless of whether he affirms or asserts the affirmative or negative of the question at issue.

In the present case appellant claims that the alleged representation was false; that appellee had no such arrangement as represented, and he so claims as matter of defense. We think it clearly incumbent on him to prove this claim. He has the affirmative of the issue.

Egbers v. Egbers, 177 Ill. 82, was a bill filed to set aside a will. One of the allegations was that the supposed testatrix never signed the will; another that she was of unsound mind, mentally incapable of making a will. The court held that the burden was on the complainant attacking the will to prove these allegations. The court say:

"Generally speaking, the burden of proof, in the sense of the duty of producing evidence, passes from party to party as the case progresses, while the burden of proof, meaning the obligation to establish the truth of the claim rests throughout upon the party asserting the affirmative of the issue, and unless he meets this obligation upon the whole case he fails. This burden of proof never shifts during the course of a trial, but remains with him to the end."

The notice of special matter contains this:

"The defendant will give in evidence that said Unique Printing Company had no such contract with said thirty leading hotels, nor with either of them," etc.

But counsel contend that slight proof of a negative may be sufficient, if it be within the power of the adverse party

to prove the affirmative, if such proof be possible. This may be conceded, and yet appellant must fail, because he produced substantially no proof whatever of the falsity of the alleged representation. Appellant's testimony was that appellee's solicitor said to him, "We have an arrangement with thirty leading hotels of Chicago," etc.

Now an arrangement may, or not, be a contract; it certainly is not *ex vi termini*. It is obvious, then, that the testimony of some of the witnesses that several hotels had no contract with the appellee is not relevant to the question. The testimony of Mullin that certain parties told him they had no contract with appellant, besides being irrelevant, was mere hearsay, which the trial judge had the right to ignore, and doubtless did ignore. *Mer. Des. Trans. Co. v. Joesting*, 89 Ill. 152.

It can not be said that it was not in appellant's power to ascertain what, if any, arrangement appellee had with the hotels which received the "Rules, Regulations and Law Banners," had he exercised reasonable diligence. It appears by his own signature on the instrument, that the hotel receipts were submitted to him December 10, 1892, and he admitted to the witness Brant that they were submitted to him. Having the hotel receipts before him, it would have been easy for him to ascertain whether appellee had any, and if so what, arrangement with the hotels. He very frankly says, in his testimony, "I must admit carelessness." By his contract he was not bound to pay anything until the receipts were produced, and the fact that he did pay is itself evidence that they were produced.

Appellant's counsel further contend that the alleged representation of appellee's soliciting agent was part of the consideration for appellant's undertaking, and must be read into the contract. It would follow logically from this proposition, if sound, that it would devolve on appellee to prove the truth of the alleged representation. We can not agree with this contention. Appellee's undertaking and obligation, as shown by the contract, was to publish appellant's card, to occupy one-third square on 5,000 Rules, Regu-

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lations and Law Banners for one year's use in thirty hotels, etc., and this undertaking or obligation can not be added to or in any way modified by verbal testimony, under the specious pretense that the undertaking of appellee was the consideration for appellee's promise, and therefore it may be shown that there was another and different consideration. If the contract in question could be so modified, it is difficult, if not impossible, to conceive of any contract in writing which could not be modified in its essential and material terms by parol evidence. The cases cited by appellant's counsel in support of this contention do not support it.

It is contended that the instrument in question was not admissible in evidence under the common counts; also that the court treated as evidence certain receipts produced on the trial and offered, but not admitted in evidence. The contract was proper evidence under the common counts. It appears that the court, during the trial, read a document which, in form, is a receipt, without any signature thereto. The receipts produced are not in the bill of exceptions, which purports to contain all the evidence, which being the case, we do not understand how it can be said that the court treated them as evidence. The mere reading by the court of a document offered in evidence is not error.

We find no reversible error in the record. The judgment is affirmed.

Chicago & E. I. R. R. Co. v. Peter Casazza.

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1. CARRIERS OF PASSENGERS—*What is Not an Improper Exercise of the Police Power Conferred by Statute.*—If a conductor, acting in good faith, requests a passenger to leave the train for non-payment of fare, and upon his refusal uses only such force as is reasonably necessary to eject him, such removal is not an improper exercise of the police power conferred by statute, and is not an unjustifiable assault *per se*. It is only when, under such circumstances, unreasonable and unnecessary force and violence are used, that such an assault begins.

2. ASSAULT—*Defined.*—An assault is defined to be an unlawful beating.

3. TRESPASS—*When it Will Lie Against a Railroad for Forcibly*

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Ejecting a Passenger.—Trespass will lie against a railroad company for forcibly ejecting a passenger where the ejection is unlawful in itself, and not from the mode of doing it.

4. SAME—*Matters of Justification Must be Specially Pleaded.*—Matters in discharge or justification in an action of trespass must be specially pleaded and can not be given in evidence under the general issue.

5. STATUTES—*Abolishing the Distinction Between Trespass and Trespass on the Case.*—The statute abolishing the distinction between trespass and trespass on the case does not operate to give any other remedy for acts so done than before existed. But the statute has removed any foundation for the objection that case and trespass can be joined, or that one count in a declaration is in trespass and another in case.

6. WITNESSES—*Tests Must Extend to All Alike.*—A test, when applied to one witness, must extend to all alike who are interested.

7. PASSENGERS—*Duty to Obey Conductor.*—It is the duty of the passenger to leave a train when requested, whether rightfully or wrongfully, by the conductor; and if he refuses and is injured in consequence by being forcibly expelled, provided only such force is used as is reasonably necessary, he can not recover damages. An actual refusal by the passenger is not necessary if his conduct is equivalent thereto.

8. CONFLICTING EVIDENCE—*Jury Should be Correctly Instructed.*—Where there is a conflict in the evidence it is important that the jury should be ~~incorrectly~~ correctly instructed.

Trespass on the Case, for personal injuries. Trial in the Superior Court of Cook County; the Hon. PHILIP STEIN, Judge, presiding. Verdict and judgment for plaintiff; appeal by defendant. Heard in the Branch Appellate Court at the October term, 1898. Reversed and remanded. Opinion filed May 26, 1899.

WILL H. LYFORD, WILLIAM J. CALHOUN and ALBERT M. CROSS, attorneys for appellant, contended that the court erred in modifying and refusing defendant's instructions as requested, to the effect that plaintiff could not recover damages for injuries caused by resisting the conductor if the conductor did not use unreasonable force in ejecting him from the train. Pa. Co. v. Connell, 112 Ill. 295; P., C., C. & St. L. Ry. v. Russ, 6 C. C. A. (U. S.) 597.

IVES & MASON, attorneys for appellee, MARCUS KAVANAGH, of counsel, contended that in an action of assault, or any action of trespass, the defendant can not, under the general issue, introduce evidence to prove a justification. A jus-

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tification must be specially pleaded. *Hahn v. Ritter*, 12 Ill. 80; *Comstock v. Oderman*, 18 Ill. App. 326; *Olsen v. Upsilonahl*, 69 Ill. 273; 1 Chitty on Pl., star page 501.

MR. PRESIDING JUSTICE FREEMAN delivered the opinion of the court.

This is an action of trespass. Appellee seeks to recover for injuries claimed to have been forcibly and violently inflicted by a train conductor in the employ of appellant. It is conceded that appellee was forcibly ejected from a suburban passenger train. The declaration charges a malicious and wanton assault, and the use of unnecessary, excessive and unreasonable force. The defendant pleaded the general issue.

There is some conflict in the evidence. Appellant contends that appellee was under the influence of liquor. At all events, he was asleep when the conductor came through the train collecting fares. It is not claimed that he had a ticket, or paid or offered to pay his fare. The theory of the plaintiff's case is that before appellee was fully awake the conductor began the assault, and that at no time thereafter did the passenger have any opportunity to pay or to offer to pay the fare. It is said that if the passenger did not refuse to pay his fare the conductor had no right to eject him, and consequently his action in so doing constitutes a malicious and wanton assault.

If the passenger did not in fact pay or offer to pay, and had reasonable opportunity to do so, then his conduct was equivalent to a refusal.

If the conductor acted in good faith, requested the passenger to leave the train for non-payment of fare, and upon his refusal to leave used only such force as was reasonably necessary in ejecting him, then such removal is not an improper exercise of the police power conferred by statute, and is not an unjustifiable assault *per se*. Rev. Stat., Chap. 114, Sec. 100.

It is only when under such circumstances unreasonable and unnecessary force and violence are used that such an assault begins.

Whether or not the conductor acted in good faith, and gave a reasonable opportunity for payment, and upon failure or refusal to pay used only such force as was reasonably necessary in removing the appellee, were questions for the jury, and we are not warranted in interfering with the finding upon the facts, if the jury was accurately instructed as to the law applicable.

The defendant company has, under proper pleadings, the right to justify the removal and deny that an assault had been committed, and to offer evidence tending to sustain such denial by showing that under the circumstances in evidence the removal of the passenger was not an assault, which is defined to be an unlawful beating (Rev. Stat., Chap. 38, Secs. 54 and 55), but a lawful exercise of statutory authority. The principle is stated in St. L., A. & C. R. R. Co. v. Dalby, 19 Ill., upon page 375, where it is said:

• “Where the act is unlawful in and of itself, and not from the mode of doing it, trespass would lie. This case may serve to illustrate: Suppose the passenger had actually refused to pay his fare, then the act of removing him from the cars would have been lawful, and if the conductor had done this lawful act so carelessly as to produce an injury, the remedy would have been case against the company.”

It is said, however, that matters in discharge or justification in an action of trespass must be specially pleaded, and can not be given in evidence under the general issue. That such is the rule is well established. Hahn v. Ritter, 12 Ill. 80; Comstock v. Oderman, 18 Ill. App. 326.

In Olsen v. Upsahl, 69 Ill. 273, it was held that the acts of an officer acting under the authority of a writ must be specially pleaded; and in Bryan v. Bates, 15 Ill. 87, which was an action for assault and battery, imprisonment, etc. Demurrers to special pleas justifying by alleging the defendant was an officer, were overruled.

In Case v. Hall, 21 Ill. 632, 635, it is said that “the rule is, where an officer himself attempts to justify his acts done by virtue of his office, he must allege and prove himself an officer *de jure*.” In cases like that under consideration, special pleas were filed, setting up the lawful exercise of

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authority. St. L., A. & C. Ry. v. Dalby, 19 Ill. 375; C., B. & Q. R. R. Co. v. Bryan, 90 Ill. 127.

In the present case, however, the defendant company, under its plea of the general issue to the declaration in trespass, had the right to introduce evidence tending to show appellee's refusal to pay the fare, refusal to leave the train, and resistance to the effort to remove him, in mitigation of damages, in the absence of any plea of justification.

In Blalock v. Randall, 76 Ill. 224, 228, it is said that trespass will not lie for an act done under legal process or by an officer of competent jurisdiction. Case only will lie, and that on the ground of malice and want of probable cause. The statute abolishing the distinction between trespass and trespass on the case does not operate to give any other remedy for acts so done than before existed. But the statute has removed any foundation for the objection that case and trespass can not be joined, and that one count in a declaration is in trespass and another in case. Barker v. Koozier, 80 Ill. 205.

But the authority of the officer must still be specially pleaded.

We can not agree with appellant's contention that there is no evidence of an assault, in view of the failure or refusal of appellee to pay fare. Though it be true that a conductor may not be acting unlawfully in ejecting a passenger, it does not necessarily follow that he does not or can not commit an assault in so doing. Whether such an assault was committed without provocation was for the jury to determine from the evidence. We find no error in the instruction to that effect, in failing to define what an assault without provocation is.

The defendant requested an instruction as follows:

"The plaintiff is permitted by law to testify in his own behalf, but the law also provides that his interest in the event of the suit may be considered by the jury in determining the credit to be given to his testimony."

This instruction the court modified by substituting for

"plaintiff" the words "the parties to the suit are," etc. We think the instruction was improperly modified. The plaintiff was the only party to the suit who testified, or could do so. The defendant is a corporation. The conductor who testified is not now in the employ of the defendant, and no witness except the plaintiff has, so far as appears, any interest in the event of the suit. The instruction falls, therefore, within the rule of Penn. Co. v. Versten, 140 Ill. 637-642, which is that "the test, when applied, must extend to all witnesses alike who are interested," and we discover no reason why the instruction should not have been given as requested. West Chicago St. Ry. Co. v. Estep, 162 Ill. 130; West Chicago St. Ry. Co. v. Dougherty, 170 Ill. 380.

The fifth instruction, as requested by appellant, was as follows:

"It is not necessary that a person claiming to be, or actually being, a passenger on a train of a railroad company should forcibly resist an attempt of the conductor to remove him therefrom in order to entitle such person to maintain an action against the company for a wrongful ejection. And if he refuses to leave the train when requested, and forcibly resists the attempt of the servants in charge of the train to eject him, he can not recover damages because of being forcibly expelled, if the force used by the servants is not greater than is reasonably necessary under the circumstances. So in this case, if you believe from the evidence that the conductor of the train in question told plaintiff he must leave the train, and that plaintiff refused to leave the same, then he can not recover for any injury he may have sustained while being put off the train, except such injuries, if any, which were caused by the use of unreasonable force by the servant or servants of the defendant, if you believe such unreasonable force was used."

The court modified the instruction as follows:

"It is not necessary that a person claiming to be, or actually being, a passenger on a train of a railroad company, should forcibly resist an attempt of the conductor to remove him therefrom in order to entitle such person to maintain an action against the company for a wrongful ejection. So in this case, if you believe from the evidence that the conductor of the train in question demanded the fare from the plaintiff, and that the plaintiff refused to pay the same, or

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to produce a ticket entitling him to passage on that train, and that the conductor then told plaintiff he must leave the train, and that plaintiff refused to leave the same, then he can not recover for any injury he may have sustained while being put off the train, except for such injuries, if any, which were caused by the use of unreasonable force by the servant or servants of the defendant—if you believe such unreasonable force was used."

The instruction as asked for was to the effect that it is the duty of the passenger to leave the train when requested, whether rightfully or wrongfully, by the conductor; and that if he refuses and is injured in consequence by being forcibly expelled, provided only such force is used as is reasonably necessary, he can not recover damages therefor.

As modified, the instruction was to the effect that it was not the duty of the passenger to leave the train when requested by the conductor unless he had actually refused to pay fare or produce a ticket; that it was only in case of being forcibly expelled, when he had thus refused to pay his fare, that he could not recover for injuries necessarily received in being put off. The inference from the instruction as given is that appellee could refuse to leave the train when required by the conductor to do so, and could then recover for injuries inflicted, even by such force as was reasonably necessary to expel him, if only he had not actually refused to pay fare or produce a ticket. As we have said, actual refusal was not necessary if his conduct was equivalent thereto.

This instruction affected the measure of damages. It is said in *Penn. R. Co. v. Connell*, 112 Ill. 296:

"When the conductor demanded that appellee should pay fare or leave the train, he would have been justified in refusing to pay fare and leaving the train on the command of the conductor; and had he done so he would have received no personal injuries, and might then have brought his action and recovered as before stated; but when he refused to leave the train, and thus compelled the conductor to resort to force, he can not recover for an injury which he voluntarily brought upon himself."

The testimony is conflicting as to what occurred between

appellee and the conductor with reference to the payment of fare, the refusal of appellee to leave the train peaceably, and the degree of force and resistance employed. Where there is such conflict, it is important that the jury should not be incorrectly instructed.

The instruction went directly to the measure of damages, and appellant concedes that the evidence was proper to be considered by the jury in mitigation of damages.

For the reasons indicated, the judgment of the Superior Court is reversed and the cause remanded.

George Schweinfurth et al. v. Gustave Poehlman et al.

1. FINAL ORDER—*When an Order Confirming a Sale and Distribution of the Proceeds Is.*—An order confirming the sale and distribution of the proceeds of a judicial sale is a final order and can not be set aside on motion after the close of the term at which it is entered.

2. APPELLATE COURT PRACTICE—*Matters Not Cognizable on Appeal.*—The Appellate Court can not, on appeal from an interlocutory order, make any final disposition of the case.

Appeal from an Interlocutory Order of the Superior Court of Cook County; the Hon. THEODORE BRENTANO, Judge, presiding. Heard in this court at the March term, 1899. Reversed. Opinion filed June 29, 1899.

S. O. CAVETTE, attorney for appellants; CHAS. S. CUTTING, of counsel.

FITCH & DUHA, attorneys for appellees.

MR. JUSTICE WINDES delivered the opinion of the court.

On a bill of review filed by appellees, Gustave and Paulina Poehlman, November 15, 1898, and amended December 30, 1898, a preliminary injunction without bond was issued February 14, 1899, by the Superior Court of Cook County, restraining A. F. Stevenson, master in chancery of that

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court, from issuing a deed for the premises in question in this case until the further order of the court.

February 10, 1899, "on motion of the solicitor," but whose solicitor is not stated, Albert, Augusta, William F., Barbara and Tillie Henne, who were defendants to the original and amended bill, were made parties complainant to the amended bill, but no further amendments were made to the amended bill. March 14, 1899, the injunction was extended to George Schweinfurth, restraining him from taking out a deed from the master, and from in any way interfering with the complainants in the possession of the property in question.

From these orders Schweinfurth and Stevenson have appealed.

The bill and amended bill set out the proceedings in a foreclosure bill filed in the Superior Court of Cook County by E. S. Dreyer, trustee, and George Schweinfurth, *cestui que trust*, against all the appellees herein and others, and also the proceedings in a creditor's bill in the same court by said Schweinfurth against the appellees, the Poehlmans, and others, for the purpose of obtaining satisfaction of a judgment of \$3,359.40 in his favor and against said Poehlmans and others. The prayer of the bill and amended bill is, in substance, that the master's report of sale and distribution, and order confirming the same, be reviewed and set aside, that the master be enjoined from issuing his deed to Schweinfurth, the purchaser of the foreclosed premises, and that Schweinfurth be enjoined from taking out a deed to the premises.

The foreclosure cause, as appears from the allegations of the bill and amended bill, appears to have proceeded regularly to decree, except that Schweinfurth was allowed to prove up before the master to whom the case was referred, his judgment, without, so far as this record shows, any allegations in the pleadings in that case which would justify such proof. The appellees did not, by their answer in the foreclosure case, set up or claim any interest or estate of homestead in the premises in question, nor did they make

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any such claim before the master or chancellor prior to the decree of sale. The cause was heard upon the bill, answer, replication and report of the master, and the court rendered a decree finding due to Schweinfurth, and secured by the trust deed sought to be foreclosed, the total sum of \$3,127, and interest at five per cent on \$2,977 from the date of the decree, which was declared to be a first lien on the premises in question; also finding due to said Schweinfurth the sum of \$3,369.40 on his judgment against the appellees, Paulina Poehlman, Albert Henne and William F. Henne, and one Frederick Henne, also a defendant in the foreclosure case, which was declared to be a second lien on the same premises, and directing a sale of the premises by the master to pay the amount secured by the trust deed, and that if there was a surplus, to apply the same toward a satisfaction of Schweinfurth's judgment, and if anything remained, that it should be held subject to the order of the court.

It further appears from the same allegations, that the premises were sold by the master for \$6,943.09 to Schweinfurth, and after paying the amount due under the trust deed of \$3,186.10, there remained a surplus of \$3,756.99, which was paid by the master to Schweinfurth on his judgment, leaving still due to him eleven cents. To this report of sale and distribution all the appellees herein filed objections November 24, 1897, among others, to the effect that they were each entitled to an estate of homestead in said premises, and that said surplus ordered to be paid to said Schweinfurth should be applied on account of the homestead rights and exemptions of appellees; that they were in possession of said premises, and claimed the same as their respective homesteads, and that their respective estates of homestead had in no way been assigned or allotted to them. No evidence in support of appellees' objections is set out in the bill, and we must presume there were none offered, and the chancellor, on December 11, 1897, confirmed the report of sale and distribution made by him.

December 31, 1897, and also February 3, 1898, appellees filed motions to set aside the sale and to sustain their

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objections to the master's report of sale and distribution, and to set aside the order of December 11, 1897, confirming the same; and also, on February 14, 1898, filed their petition setting up, in substance, the same matters as stated in their objections to the master's report of sale and distribution, but set out in the bill no evidence produced to the court in support of their motions nor of their petition. The bill does not state what, if any, disposition was made by the court of these motions or of the petition, nor does it state whether or not there was any consolidation of the creditor's bill of Schweinfurth with the foreclosure bill, nor whether there was any pleading filed by Schweinfurth in the foreclosure case setting up his judgment, which was found by the court to be a second lien on the premises in question.

As there was nothing before the court by way of proof, so far as shown by the bill and amended bill, to sustain any of the objections of appellees to the master's report of sale and distribution, there was no error in the order of the court overruling such objections and confirming the sale and distribution made by the master.

In the absence of a showing that the court failed to proceed regularly in the foreclosure case, inasmuch as it is a familiar rule of pleading that a pleading must be construed most strongly against the pleader, this court is justified in presuming, and must assume for the purposes of this case, either that there was some order consolidating the creditor's bill with the foreclosure bill, or that there was some pleading filed by Schweinfurth in the foreclosure case setting up the judgment and making allegations which would justify the evidence before the master, and the decree of the court making the judgment a second lien on the premises in question, and providing for its payment out of any surplus arising from the sale under the foreclosure decree.

We have seen that the bill and amended bill fail to show that there was any evidence produced or offered before the court in support of either of the motions to set aside the sale and distribution, or of the petition to the same effect,

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and therefore if they were overruled and denied, which is not shown, this would not constitute error. Moreover, the court could not properly allow the motion of February 3, 1898, nor grant the petition filed afterward, because the order confirming the sale and distribution was a final order, and the term of court at which it was entered had passed before this motion was made and before the petition was filed.

There being no error of fact shown in the order of the court in confirming the sale and distribution made by the master, and the appellees having failed to show by their bill and amended bill that they had any right of homestead which was presented to the chancellor and supported by proof on the hearing of objections to the master's report, there was no error of law in the court's order here sought to be reviewed and set aside, and the injunction should not have been granted. *Ebert v. Gerdin*, 116 Ill. 224.

It is unnecessary for us to decide whether the allegations of the bill and amended bill are sufficient to show that appellees were entitled to estates of homestead in the premises in question, or in the surplus arising from the sale and foreclosure, as this question was not presented to the chancellor in the foreclosure case in such manner as would justify him in setting aside the sale and distribution. We can not, on appeal from an interlocutory order, make any final disposition of the case, as asked by appellants.

The remedy of appellees, if any, would seem to be by further amending their bill so as to show, if they can, that such facts were presented to the chancellor in the foreclosure case as would establish that the court erred in law in the application of those facts by the entry of the order in question, or by writ of error in the foreclosure case.

The order of injunction is reversed.

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1. **CONTRIBUTORY NEGLIGENCE—Will Bar a Recovery.**—Any negligence on the part of the plaintiff, however slight, which contributes to an injury, will bar a recovery.

2. **INSTRUCTIONS—Misleading, When Reversible Error.**—In a case where the evidence is conflicting, an instruction which is argumentative and calculated to mislead a jury, requires a reversal of the judgment.

3. **SAME—Erroneous, When Not Cured by Others.**—Instructions which announce to the jury incorrect rules of law are not cured by other and correct instructions.

Action in Case, for personal injuries. Trial in the Superior Court of Cook County; the Hon. GEORGE A. TRUDE, Judge, presiding. Verdict and judgment for plaintiff; appeal by defendant. Heard in this court at the October term, 1898. Reversed and remanded. Opinion filed June 22, 1899.

Statement.—Appellee, a laborer in the employ of appellant, attempted to board one of the trains of appellant, and while so doing was injured.

As to the negligence of appellant and the exercise of care by appellee alleged in the declaration, there was a decided conflict in the evidence.

The trial resulted in a verdict against appellant, by which appellee's damages were assessed at \$5,000. A remittitur of \$2,000 was entered, and a judgment rendered for \$3,000. From that judgment this appeal is prosecuted.

Wm. J. HYNES and W. J. FERRY, attorneys for appellant;
MASON B. STARRING, of counsel.

The injury must be attributable to the defendant's own negligence, and to that alone. If occasioned in any degree by the plaintiff's negligence he is without redress. N. J. Exp. Co. v. Nichols, 33 N. J. L. 434; Chicago City Ry. Co. v. Canevin, 72 Ill. App. 81, and cases therein cited; Chicago City Ry. Co. v. Fenimore, decided by this court at the October term; not yet reported; Chicago City Ry. Co. v. Lizzie Sullivan, decided by this court at the June term, 1898; not yet reported.

JAMES McSHANE, attorney for appellee.

MR. JUSTICE SEARS delivered the opinion of the court.

It will not be necessary to consider the evidence at length. It was conflicting, and it is sufficient to say of it that, after an examination of it all, we are of opinion that a verdict for either litigant could not be declared by a court of review to be manifestly against the weight of the evidence. We have, therefore, only to consider matters of procedure, and that consideration may be confined to the instructions given.

On behalf of the plaintiff, appellee, the court gave the following, among other instructions:

1. "The court instructs the jury that slight negligence is not necessarily incompatible with due and ordinary care, and hence, if you believe from the evidence that the plaintiff was guilty of slight negligence, and slight negligence only, yet if you further believe from the evidence that before and at the time of the injury in question he was exercising due and ordinary care for his own safety, then he did all the law required of him in this regard. Ordinary care, as mentioned in these instructions, is that degree of care which an ordinarily prudent man, situated as the plaintiff was, before and at the time of the injury, would have exercised for his own safety."

2. "The court instructs the jury that even if you believe from the evidence that the plaintiff attempted to board the car in question while the car was in motion, that fact, if it be a fact, does not necessarily charge the plaintiff with contributory negligence as a matter of law. The question is still for the jury whether, in view of that fact and of all the other facts and circumstances of the case, the plaintiff was or was not exercising ordinary care, under the circumstances, for his own safety."

Each of these instructions is subject to criticism. The first is technically correct in the proposition of law contained. While any negligence, however slight, which contributed to the injury would bar a recovery, the law regarding any negligence which contributes as a cause of the injury as negativing an exercise of ordinary care, yet, if there be negligence which can not be said to have contributed to the injury, and if the plaintiff is found to have

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been in the exercise of ordinary care, the plaintiff is not barred by reason of negligence which had nothing to do with causing the injury. But while to a lawyer the instruction may thus convey a correct proposition of law, yet it is calculated to mislead a jury, for it is not to be expected that they would, without direction, distinguish between slight negligence which did, and slight negligence which did not, contribute to the injury. It is likely to mislead.

The same may be said of the second instruction. It presents a correct statement of the law, but it is argumentative. It undertakes to tell the jury what is not "necessarily" and "as a matter of law" negligence. It is calculated to impress the jury with an argument that the very fact most relied upon by the defendant as constituting contributory negligence need not be so considered by them. It is undoubtedly a correct proposition that the jury might have determined that this fact did not constitute contributory negligence, but they should have been left to reach such conclusion, if at all, by their own determination of what did, under the given circumstances, constitute ordinary care.

The majority of the court are of opinion that the giving of the second of the foregoing instructions in a case where the evidence is so conflicting requires a reversal of the judgment.

If the proposition of law contained in either instruction was inaccurate, there could be no question, for other and correct instructions given are not to be regarded as curing instructions which announce to the jury incorrect rules of law. It can not be determined which of the inconsistent directions the jury adopted. But where, as here, the vice of the instruction consists only in its misleading form, and not in any incorrect rule of law presented, it would seem that the tendency to mislead might be overcome by other instructions given, which so present the same matters as to prevent the jury from being misled.

Among the instructions tendered by the defendant, appellant, there were nine, which presented to the jury, in vary-

ing form, the care required of the plaintiff, appellee, to entitle him to a recovery, and which very fully informed the jury that no recovery could be had if the appellee had been guilty of any lack of ordinary care, and that if boarding the car under the circumstances surrounding was a lack of ordinary care upon his part, he could not recover. The writer is of opinion that the giving of these instructions might be safely regarded as operating to prevent the jury from being misled by the two improper instructions above set forth.

In conformity to the opinion of the majority of the court the judgment is reversed and the cause remanded.

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Peter Meilinger et al. v. The People, etc.

1. PLEADING—*Pending of a Former Suit*.—The pendency of the former action, upon writ of error or appeal, merely defeats the present proceeding. It is not necessarily a bar to the action, and should ordinarily be pleaded in abatement.

2. PRACTICE—*Effect of Entering Appearance*.—If a defendant enters his appearance to a declaration, a judgment is binding, although a writ has not been issued or service had.

3. SAME—*After All Pleas Are Overruled*.—After the pleas to a declaration have all been overruled, and nothing remains but to assess damages, either party may have the damages assessed by a jury. (Rev. Stat., Chap. 110, Sec. 41.)

4. SAME—*Effect of a Failure to Preserve Points*.—Where an appellant fails to preserve by a bill of exceptions the points upon which he relies, he must suffer the consequences.

Debt, on a bond. Trial in the Circuit Court of Cook County; the Hon. JOHN GIBBONS, Judge, presiding. Finding and judgment for plaintiff; appeal by defendants. Heard in the Branch Appellate Court at the October term, 1898. Affirmed. Opinion filed May 26, 1899.

BOWLES & BOWLES, attorneys for appellants.

DAVID S. GEER, attorney for appellee.

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MR. PRESIDING JUSTICE FREEMAN delivered the opinion of the court.

This is an action in debt on a sealed instrument. The condition of the bond as set forth in the declaration, is that appellants are "bound unto the People of the State of Illinois in the penal sum of \$1,500, for the payment of which" they bind themselves, the condition being that one George A. Weimer should pay the clerk of the Circuit Court \$676.76, with interest, etc., on the 15th day of March, 1897.

It appears that Weimer, as supervisor of the town of Lemont, had been commanded by a peremptory writ of mandamus, issued out of the Circuit Court, to pay over to the party entitled thereto, the sum above stated, and that upon his failure to comply with such order he was required to show cause why he should not be attached for contempt. The hearing upon the rule to show cause was allowed to be continued, upon his giving bond to comply with the order requiring payment, by the 15th of March.

A writ of error was meanwhile sued out of the Appellate Court to reverse the order of the Circuit Court in the mandamus proceeding, and was made a supersedeas. But upon the hearing, the judgment of the Circuit Court was affirmed. *Weimer v. People*, 72 Ill. App. 119.

It is urged as error that the court overruled pleas to the effect that this suit on the bond was begun while the mandamus proceeding was still pending in the Appellate Court, and after the writ of error had been made a supersedeas.

We think, however, the pleas in question were defective. It was not enough merely to set up in bar to the action that the writing obligatory sued upon had been given in another proceeding which was still pending in the Appellate Court. The pendency of the former action, upon writ of error or appeal, merely defeats the present proceeding. It is not necessarily a bar to the action, and should ordinarily be pleaded in abatement. It was not so pleaded. It is the advantage or relief prayed for by the plea that determines its character. The proper prayer of a plea in abatement is that the writ and declaration be quashed.

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The subject-matter of the pleas in question clearly falls within the definition of matter pleadable in abatement, and not in bar. It was pleaded in bar, and the pleas being bad, when the defendants elected to stand by their pleas, final judgment was properly rendered against them. Pitts' Sons Mfg. Co. v. Commercial Nat. Bank, 121 Ill. 582.

The fourth amended plea sets forth that the order entered in the mandamus proceeding required Weimer, as supervisor of the town of Lemont, to pay over the money unlawfully withheld; and that while the case was pending on writ of error in the Appellate Court, he was superseded in office as supervisor, and that he turned over all records and moneys of the town to his successor. It is only necessary to say, aside from technical objections, that when the order commanding payment of the money was affirmed in the Appellate Court, it became effective against him from the date it was originally entered. It was not error to sustain a demurrer to such a plea. If the plea was good, then any official whose successor is elected and qualified pending an appeal could plead successfully that, his term as a public official having expired, his liability for official misconduct was thereby terminated, and a new proceeding must be commenced against the new officer, to hold him accountable for the misconduct of his predecessor, and so *ad infinitum*. Appellant can not thus escape responsibility.

It is further contended that the plea by defendant Weimer, averring that he was unlawfully threatened with imprisonment unless he executed the writing obligatory sued upon, and that it was by reason of such threats and in fear thereof that he executed it, was, if sustained by the evidence, a complete bar to the action. But such plea fails to show how, where or when such alleged threats were made, in what they consisted, or that they were made by one having any power to execute them whatever.

The defendants' pleas show upon their face that the appellant Weimer was in court under a rule to show cause why he should not be attached for contempt, and seeking further time, entered into the obligation in question. If this was

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duress, the same is true of bonds given in all criminal or quasi-criminal proceedings. If appellant had obeyed the order of the Circuit Court, and paid over, as commanded, the money he unlawfully withheld, no such obligation would have been required of him.

It is said the judgment against Weimer does not provide that the debt be discharged upon payment of the damages. The judgment against Meilinger and Hofmann does provide that it is to be satisfied upon payment of the damages and costs; and Weimer was made a party "to the original judgment" under a writ of scire facias. See Freeman v. The People, 54 Ill. 153.

The defendant Weimer objects that damages were assessed against him before the court had jurisdiction.

Weimer entered his appearance after judgment had been rendered against the sureties, at the same term, and filed his plea, which was adjudged insufficient on demurrer. The court had jurisdiction. "If a defendant enter his appearance to a declaration, all attorneys know that a judgment is binding, although a writ was never issued or service had." Miles v. Goodwin, 35 Ill. 53.

It was too late, after damages had been assessed and judgment rendered against the sureties, to ask for a jury for "the hearing of this cause." The record shows that a separate judgment was entered making Weimer a party to the original judgment ten days thereafter. The bill of exceptions fails to show at which date—the 9th or 19th of February—objection was made "to the hearing of this cause without a jury," nor by what defendants. The pleas had all been overruled. Nothing remained but to assess damages. "Either party may have the damages assessed by a jury" (Rev. Stat., Chap. 110, Sec. 41), if the request is made in apt time. Electric Co. v. Mfg. Co., 111 Ill. 309, 315; Palmer v. Harris, 98 Ill. 507; Pinkel v. Domestic S. M. Co., 89 Ill. 277; Kassing v. Griffith, 86 Ill. 265.

It would be, perhaps, hypercritical to say that no specific request was made for a jury to assess the damages, although technically this is true. But judgments having been ren-

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dered at two different times, and on one occasion, at least, without any mention of a jury, it would be unjust to set aside the judgment against all the defendants, where the bill of exceptions does not show when nor by whom the objection was made. If appellants fail by their bill of exceptions to preserve the points upon which they rely, they must suffer the consequences.

It does not appear that any error was made in the assessment of damages.

Other errors are assigned. It is sufficient to say that we find no serious error in the record, and the judgment of the Circuit Court must be affirmed.

Amundson Printing Co. v. Empire Paper Co.

1. APPELLATE COURT PRACTICE—*Insufficient Abstract.*—An abstract of the record which is a mere index is insufficient.

2. SAME—*Where a Judgment Will Not be Reversed.*—No judgment will be reversed for errors which are not made to appear by the abstract.

3. ABSTRACTS—*The Word "Judgment" Shows no Judgment.*—The single word "Judgment" appearing in the index filed as an abstract of the record is not sufficient to indicate that there was a judgment rendered in the cause.

Assumpsit.—Trial in the Circuit Court of Cook County; the Hon. JOHN GIBBONS, Judge, presiding; verdict and judgment for plaintiff; error by defendant. Heard in the Branch Appellate Court at the October term, 1898. Affirmed. Opinion filed May 26, 1899.

W. KNOX HAYNES, attorney for plaintiff in error.

TENNEY, McCONNELL, COFFEEN & HARDING, attorneys for defendant in error.

MR. JUSTICE SHEPARD delivered the opinion of the court.

The printed abstract of record, filed in this court, is a mere index as to everything except the bill of exceptions. "Narr. and affidavit of claim" is all that is anywhere shown of the declaration.

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Coming to the bill of exceptions, it appears in the testimony of one of the witnesses that he received four orders, stated to be marked, respectively, as exhibits, and also that he made deliveries of paper and obtained receipts therefor, four in number, likewise stated to be marked as exhibits. It would seem that such evidences, susceptible of being marked as exhibits, were probably in writing, but neither they, or either of them, nor any abstract or synopsis of them, appear anywhere in the abstract. Without them before us we can not say they do not embody a complete contract that afforded ample justification for the exclusion by the trial court of the offered evidence concerning the time when payment was to be made, and of the claimed damages because of claimed delays in the delivery of the goods, under the contract as expressed in the orders.

It is said by the same witness that "the total amount of these orders and invoices which have been produced, is, excluding the note, \$605.68."

From this last statement we may infer that a promissory note for some amount was involved in the suit, but if so, the abstract, including the bill of exceptions as there shown, makes no mention of it.

Non constat, the note was that of the appellant, and for a sufficient amount to cure every error the appellant relies upon.

No judgment is shown by the abstract. The single word "Judgment," appearing in the index we have referred to, is all there is in the abstract to indicate there was ever a judgment rendered in the cause.

It is not a satisfactory way of disposing of a case where an appellant has come here in a sincere effort to have alleged errors reviewed, but if we respect our rules and the many decisions of the Supreme and Appellate Courts of this State (and if we do not, who shall?), we may not reverse a judgment upon an abstract which so inadequately complies with the rule that requires the party bringing his case here to "furnish a complete abstract or abridgment of the record."

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The practice has long been thoroughly settled in this State that no judgment will be reversed for errors which are not made to appear by the abstract. Among the latest decisions are: Gibler v. City of Mattoon, 167 Ill. 18; Guerin v. Corigan, 78 Ill. App. 554; Dorn v. Ross, 77 Ill. App. 223; Casey v. Vandeventer, 76 Ill. App. 628.

Sometimes the courts have turned to the records where the abstract has been deficient, but, we believe, never to reverse a judgment, only where it has been thought advisable to give other reasons for affirming.

The cases of City Electric Railway Company v. Jones, 161 Ill. 47, and Martin v. McMurray, 74 Ill. App. 44, are late instances of so doing. Affirmed.

Daniel Stern v. Caroline Eichberg, Simon Sichel and Moses N. Strauss, Executors.

1. PROMISSORY NOTES—*Payable to an Estate*.—Promissory notes payable to an estate of a deceased person are valid not only as promissory notes, but also as evidence of an indebtedness, and are admissible in proof under the common counts.

2. SAME—*Sufficient Name of the Payee*.—Where the payee named in a promissory note was “the estate of Samuel Eichberg,” it was held to afford a designation by which the payee can be ascertained, the maxim *Id certum est quod certum reddi potest* applying, and is competent as evidence of an admission of the maker’s liability under the common counts.

Assumpsit, on promissory notes. Trial in the Superior Court of Cook County; the Hon. SAMUEL C. STOUGH, Judge, presiding. Verdict and judgment for plaintiff; error by defendant. Heard in this court at the October term, 1898. Affirmed. Opinion filed June 22, 1899.

BLUM & BLUM, attorneys for plaintiff in error, contended that there was no payee named who was capable of receiving payment; no payee who had the capacity of a person, either natural or artificial. It is essential to the validity of a promissory note that the payee should be clearly expressed

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on its face. Tittle v. Thomas, 30 Miss. 122; Blackman v. Lehman, 63 Ala. 553; Lyon v. Marshal, 11 Barb. 248; Bowles v. Lambert, 54 Ill. 237; Rich v. Starbuck, 51 Ind. 87; Norton on Bills and Notes, 62.

STERN & LOUER, attorneys for defendants in error.

The notes payable to the “estate of Samuel Eichberg,” deceased, are valid promissory notes, and, furthermore, are competent evidence of the original indebtedness under the common counts. Hendricks, Exr., v. Thornton, 45 Ala. 299; Shaw, Admr., v. Smith, 6 L. R. A. 348; Peltier v. Babillion, 45 Mich. 384; McKinney v. Harter, 7 Blackf. 385; Lewisohn v. Kent, 87 Hun, 257; Van Etten v. Hemann, 35 Mich. 513; Murray, Admr., v. East India Co., 5 B. & Ald. 204; Walrad v. Petrie, 4 Wend. 576; Osgood v. Parsons, 4 Gray, 455; Smith, Admr., v. Smith, 2 Johns. 235; Ketchum, Exr., v. Ketchum, 4 Cow. 87; Patton, Admx., v. Melville, 21 Up. Can. (Q. B.) 263.

MR. PRESIDING JUSTICE WINDES delivered the opinion of the court.

Defendants in error, who are executors of the last will and testament of Samuel Eichberg, deceased, brought assumpsit against plaintiff in error, declaring specially upon fifteen promissory notes of divers amounts, payable “to estate of Samuel Eichberg,” becoming due at divers dates, with interest, and also in the common counts. Plaintiff in error pleaded the general issue and two special pleas. Demurrer was sustained to the special pleas, and on a trial before the court and a jury, the court instructed a verdict for defendants in error for \$4,800, which was returned accordingly, and after a remittitur of \$40, the court rendered judgment for \$4,760, from which this appeal is taken. No evidence was offered by plaintiff in error.

It is claimed, first, there could be no recovery because the notes declared on and offered in evidence are payable “to estate of Samuel Eichberg;” second, that there were material variances between the notes declared on and those offered

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in evidence; third, that the court erred in refusing to allow plaintiff in error to file a plea of non-joinder, after defendants in error were allowed on the trial to amend the declaration; fourth, that the court instructed the jury orally; fifth, that the court erred in the admission of evidence; and sixth, that the declaration does not aver that defendants in error were executors, etc.

The first claim is not tenable. The notes were valid not only as promissory notes, but were also evidence of an indebtedness by plaintiff in error, and admissible in proof under the common counts. *Hendricks v. Thornton*, 45 Ala. 299-309; *Blackman v. Lehman*, 63 Ala. 553; *Peltier v. Babillion*, 45 Mich. 384; *Walrad v. Petrie*, 4 Wend. 576, *Lewisohn v. Kent*, 87 Hun, 257; *Shaw v. Smith*, 6 L. R. A. (Mass.) 348.

This question as to whether the notes are valid, does not seem to have been passed upon directly in this State. In *Bowles v. Lambert*, 54 Ill. 237, the Supreme Court said, with reference to an instrument, viz.—“I owe the estate of Zenos Warden, \$190.15. May 13, '63. Joseph Bowles,”—that under the evidence in the case, the court inferred “that it was intended only as a statement of the balance of his account with the estate of Warden. It was evidence that Bowles then owed the estate the sum specified therein. If it was not a promissory note, but merely a statement of the account, the subsequent settlement and the giving of the note for \$174.57 operated to cancel it,” and reversed the judgment because the evidence failed to sustain the verdict.

In the *Hendricks* and *Peltier* cases, *supra*, instruments like the ones in question were held to be valid promissory notes.

In the *Blackman* case, *supra*, the court said: “The payee need not be named, but on its face the instrument must afford an indication or designation by which he can be certainly ascertained; the maxim applying, *Id certum est quod certum reddi potest.*”

In the *Lewisohn* case, *supra*, the court says on this question there is a conflict of authority, but held that such an instrument “was a promissory note payable to a fictitious

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payee, and having been negotiated by the maker, was payable to bearer," and also that it was evidence of the existence of a valid indebtedness in favor of the plaintiff, to whom it had passed by indorsement.

In the Walrad case, *supra*, it was held that such an instrument was admissible in proof to sustain the common counts.

In the Shaw case, *supra*, decided in 1889, the court stated that two cases (relied upon by plaintiff here, Tittle v. Thomas, 30 Miss. 122, and Lyon v. Marshall, 11 Barb. 241–8) sustained the contention that such an instrument as the one at bar was not a promissory note, but held that "this is too strict an application of the doctrine that the person to whom a note is payable must be clearly expressed. It is an equally general rule that it is sufficient if there is in fact a payee who is so designated that he can be ascertained. * * * It savors of too much refinement to hold that the instrument was not a valid promissory note for want of a sufficiently definite payee." The payee was "the estate of F. B. Bridgman." We will follow the later cases, which we consider are founded on principles of justice, and are the more reasonable.

As to the second and sixth claims, it is sufficient to say that the abstract of the declaration and evidence is so imperfect that we are unable to determine from it whether there was any error in the respects claimed. We have repeatedly held that appellant must show by his abstract that any error complained of was committed.

We think the third contention is not tenable, because while defendants asked leave to amend the declaration, no amendment was in fact made, and none was necessary so far as we are able to determine from the abstract.

The fourth claim can not be maintained, because the record shows the jury was instructed in writing.

We can not assent to the fifth contention. The copies of notes offered in evidence were sufficiently proved, and also the loss of the originals, which made the secondary evidence competent.

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There was no prejudice, if it was error, to plaintiff in error by the admission of evidence as to sales of merchandise by Samuel Eichberg to the firms of Stern Brothers & Bisson and I. Stern & Co., of which firms it is claimed plaintiff in error was a partner, because, as we have seen, the notes, as notes, made a *prima facie* case of liability against plaintiff in error, and they were also evidence, by way of admission, of his liability under the common counts.

The judgment is affirmed.

American Brewing Co. v. The Berner-Mayer Co., for the use of the Dime Savings and Banking Co.

1. ACCOUNT STATED—*What is a Sufficient Showing.*—If a fixed and certain sum is admitted to be due to a plaintiff, for which an action will lie, it will be evidence to support a count on an account stated.

2. SAME—*Evidence of the Original Debt Unimportant.*—In an action upon an account stated, the original form or evidence of the debt is unimportant, for the stating of the account changes the character of the cause of action and is in the nature of a new undertaking.

3. SAME—*Action Not Founded upon the Original Undertaking.*—An action of account stated is not founded upon the original contract, but upon the promise to pay the balance ascertained.

4. PLEADING—*Copy of Account Sued on.*—A copy of the account sued on and filed with the declaration is no part of the declaration.

Assumpsit, on an account stated. Trial in the Superior Court of Cook County; the Hon. JOSEPH E. GARY, Judge, presiding. Verdict and judgment for plaintiff; appeal by defendant. Heard in this court at the October term, 1898. Affirmed. Opinion filed June 29, 1899.

O'DONNELL & COGHLAN, attorneys for appellant.

ARTHUR B. FLEAGER, attorney for appellee; S. S. PAGE, of counsel.

MR. JUSTICE ADAMS delivered the opinion of the court.

This is an appeal from a judgment rendered in favor of appellee and against appellant in an action of assumpsit.

American Brewing Co. v. Berner-Mayer Co.

The declaration contained the common counts, including a count on an account stated. The appellant pleaded the general issue and filed an affidavit of merits stating that it had a good defense to appellee's claim, except as to the sum of \$600. Appellee introduced in evidence the answer of appellant in a garnishment proceeding in the Circuit Court of Cook County, in a cause entitled the Berner-Mayer Company for the use of Chancellor L. Jenks v. American Brewing Company, garnisher, which answer contains the following:

"In answer to the sixth interrogatory the said American Brewing Company says that about the 10th day of December, A. D. 1897, it was indebted to the Berner-Mayer Company in the sum of seven hundred and sixty-eight dollars and six cents (\$768.06).

That about the 20th day of December, A. D. 1897, and prior to the commencement of this suit, said defendant, American Brewing Company, received notice of the assignment of said claim by said Berner-Mayer Company to the Dime Savings and Banking Company of Cleveland, Ohio, and the acceptance thereof by said Dime Savings and Banking Company."

Appellee also introduced in evidence certain contracts between the parties for work done by appellee for appellant at certain specified prices. Appellant introduced no evidence, and the court instructed the jury to return a verdict for appellee for the sum of \$768.06, which was done, and judgment was rendered on the verdict.

Appellant's counsel objected to the introduction in evidence of the answer in the garnishee case, claiming that it was incompetent. We think it was clearly competent in support of the count on an account stated. Chitty says: "The present rule is, that if a fixed and certain sum is admitted to be due to a plaintiff, for which an action would lie, that will be evidence to support a count on an account stated." 1 Chitty on Pl., 9th Am. Ed., 358.

Moreover, the answer was by appellant, a party to this and the former record, appellee being also a party to both records, and was admissible as an admission of record. 1 Greenl. on Ev., 13th Ed., Sec. 171.

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Appellant's counsel contend that the bill of particulars filed with the declaration, which contains numerous items, is a part of the declaration, and that the garnishee's answer did not tend to prove any of those items. In Missouri River Telegraph Co. v. National Bank, etc., 74 Ill. 217, the trial court sustained a demurrer to a declaration containing the common counts. No account was filed with the declaration. The court, after holding that it was error to sustain the demurrer to the common counts, say: "This court has held that such account is no part of the declaration, and we can hardly see how it ever became necessary to make such a decision, as any one at all conversant with the elementary principles of pleading must see that it can form no part of the declaration." Ib. 222.

In Throop et al. v. Sherwood, 4 Gilm. 92, the court say: "In an action upon an account stated, the original form or evidence of the debt is unimportant, for the stating of the account changes the character of the cause of action, and is in the nature of a new undertaking. The action is founded, not upon the original contract, but upon the promise to pay the balance ascertained," citing cases. One of the items in the bill of particulars is, "To balance due on account stated, \$1,500."

The judgment is affirmed.

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1. INJUNCTIONS—*Waiver of the Right to Object that it was Granted Without Notice.*—The objection that an injunction has been issued without notice is waived by appearance without objection, and having a hearing, in respect to such injunction, in the trial court.

2. SHAREHOLDER—*Accounting After a Dividend is Declared.*—After a dividend has been declared by a corporation a shareholder can maintain a bill in equity for an accounting.

Appeal from an Interlocutory Order granting an injunction, entered by the Circuit Court of Cook County; the Hon. JOHN GIBBONS, Judge, presiding. Heard in this court at the March term, 1899. Affirmed. Opinion filed June 29, 1899.

Cook County Brick Co. v. Kaehler.

Statement.—This is an appeal from an interlocutory order enjoining the appellant corporation from “dissolving said corporation, or from in any way disposing of or closing up its business, until the further order of the court.”

It appears from the bill, and exhibits made a part thereof, that the appellant, the brick company, executed to Kaehler, appellee, a lease of date December 15, 1897, of certain described premises in Cook county, Illinois, “and all the clay and all seams and beds of clay associated therewith, lying and being in or under said parcel of land, with the full liberty and power to work, mine and raise and manufacture into brick, and carry away after so manufactured, the said clay,” etc. The term created by the lease was from December 15, 1897, till June 10, 1901. The appellee, in consideration of the said demise to him, agreed to pay to appellant the sum of \$1.50 per 1,000 on each and every 1,000 of brick manufactured at said premises and delivered or used within said Cook county, or north of the Joliet branch of the Michigan Central Railroad in Lake county, Indiana, excepting brick sold or optioned prior to November 11, 1897, statements to be furnished by appellee to appellant daily of brick sold the previous day, etc., said payment of \$1.50 per 1,000 to be made on or before the 20th day of each month next succeeding the delivery of the brick sold, the first payment to be made January 20, 1897, appellee also to pay to appellant \$1.50 per 1,000 of brick manufactured as aforesaid, but unsold at the termination of the lease.

The lease contained the following provisions:

“As a further assurance for the prompt payment of the rent and royalty herein provided for, and agreed to be paid by said lessee to said lessor, and of the faithful performance by said lessee in the manner and at the time specified herein, time being of the essence of this agreement, said lessee has deposited with the treasurer of the Cook County Brick Company, of Chicago, Illinois, nine shares of the capital stock of said Cook County Brick Company, which shares were issued to and indorsed in blank by Peter F. Kaehler, but which shares are now owned by said lessee, of the par value of twenty-five dollars (\$25) per share, and has and does hereby covenant and agree to and with said lessor that

if default shall be made in payment of said rent or royalty, or in the keeping or performing of any of the covenants or agreements herein contained to be kept or performed by said lessee, or if the same, or any of them, shall not be kept and performed by said lessee at the time and in the manner specified herein, or if said lessee shall become ousted or dispossessed of said premises or plant, or any material part thereof, that then and in that case said nine shares of capital stock of said Cook County Brick Company shall, upon demand being made by the president or vice-president of said Cook County Brick Company upon said treasurer, be delivered to said party so demanding them, and said stock shall thereupon become and be the property of said Cook County Brick Company, and the said treasurer is hereby authorized and instructed to fill out said blank indorsement, and do all things necessary so as to transfer said stock, with all unpaid dividends, to said Cook County Brick Company, and in case said transfer of said stock is so made, then and in that case said lessor covenants and agrees to pay to, or place to the credit of said lessee the par value of said stock, reserving the right, however, to apply the same in payment of any damages or indebtedness due or owing from said lessee to said lessor."

"It is expressly understood and agreed by and between the parties aforesaid, that if the rent or royalty above reserved, or any part thereof, shall be behind or unpaid after the day of payment whereon the same ought to be paid as aforesaid, or if default shall be made in any of the covenants or agreements herein contained, to be kept by the said lessee, it shall and may be lawful for the said lessor, at its election, to declare said term ended, and into said premises, or any part thereof, either with or without the process of law, to re-enter; and the said lessee, or any person or persons occupying, in or upon the same, to expel, remove and put out, using such force as may be necessary in so doing, and the said premises again to repossess and enjoy as in its first and former estate."

The lease also contained this provision:

"It is further agreed that in case of the forfeiture or determination of the lease prior to the 10th day of June, A. D. 1897, that said lessor will pay to said lessee at the rate of six hundred and seventy-five dollars per year for the unexpired term."

The bill was filed March 10, 1899, and contains in addi-

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tion to averments in regard to the lease, substantially the following: That appellee has remained in possession of the demised premises ever since the execution of the lease; that he deposited with appellant's treasurer the nine shares of the capital stock of appellant mentioned in the lease; that after the execution of the lease he paid, and continued to pay all amounts by him to be paid under the lease up to and including July 30, 1898; that July 11, 1898, appellant sent to him the following notice:

“CHICAGO, ILL., July 11th, 1898.

PETER F. KAEHLER, Esq.

DEAR SIR: You are hereby notified that the lease of the Cook County Brick Company, lessor, with you, has this day been canceled. Yours respectfully,

COOK COUNTY BRICK COMPANY,
L. H. HARLAND, Sec'y.”

That at the time of said attempted cancellation, appellee was not in default under any of the terms or provisions of said lease; that July 30, 1898, he received the following statement of account:

“CHICAGO, ILL., July 30, 1898.

Peter F. Kaehler, City.

In account with Cook Co. Brick Co.

July 11, Acc't rend. Credit Memo.....	\$225 00
June 30, " "\$109.84
July 30, " " 36.75
	146.59

Balance due you..... \$ 78.41

For which herewith please find our check.

Cook Co. BRICK Co.,

By L. H. HARLAND, Sec'y.”

That the debit items, \$109.84 and \$36.75, were for royalties or rent on brick at \$1.50 per 1,000, and that he returned appellant's check and mailed his check to appellant for \$146.59, which was returned; that July 10, 1899, appellant's directors declared a dividend, the amount of which is unknown to appellee, but is in excess of \$450 on his shares; that at the time of said attempted cancellation, appellant did not pay, or offer to pay to appellee, at the rate of \$675 per year for the unexpired term of the lease, but only offered

to pay \$225 on said nine shares, and appellee is informed and believes, and so states the fact to be, that at said time said nine shares were worth \$900 in the open market; that said shares were indorsed in blank by appellee, and appellee is informed and believes and states the fact to be, that when said cancellation was attempted said shares were sold, but for what amount appellee can not state; that in and by the above statement of account, appellant charged appellee with royalties at the rate of \$1.50 per 1,000 of brick July 30, 1899, which appellee claims was a waiver of said attempted cancellation of the lease; that appellee has tried by all means in his power to obtain a just and true accounting with appellant of the amount legally due him, but has been unable to obtain the same; that appellant by refusing to account to him for the profits on his stock, and by the sale of his stock, is guilty of fraud and is attempting to convert to its own use appellee's property; that appellee has been informed by appellant's secretary that appellant is about to dissolve, surrender its charter and wind up its affairs, and that a suit at law would be unavailing, because, before judgment could be recovered, appellant's assets would be dispelled and scattered; that appellee has been informed and believes, and charges the fact to be, that a corporation is about to be organized in the city of Chicago to include all the brick manufacturers and brick companies in Cook county, and that appellant is about to be absorbed into said corporation; that appellant has no visible assets, its assets consisting of contracts for royalties with its stockholders, who are manufacturers of brick; that monthly dividends are declared on the stock and are now due to appellee, but he can not ascertain the amount thereof, for the reason that the list of its stockholders and the books of appellant are in appellant's possession, and appellant refuses to make any statement of any kind to appellee in respect to said dividends; that unless appellant be enjoined, etc., appellee fears that it will dissolve and scatter its assets, etc. Prayer for an accounting, process, injunction, general relief, etc.

E. K. SMITH, attorney for appellant.

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J. J. McDANNOLD and D. I. JARRETT, attorneys for appellee.

MR. JUSTICE ADAMS delivered the opinion of the court.

Appellant's counsel, in his argument, makes but two objections, namely, that the bill shows no ground for equitable relief, and that the injunction was granted without notice. These, therefore, will only be considered, other objections, if any, being deemed waived.

The objection as to want of notice is untenable because appellant moved in the trial court to dissolve the injunction and made an additional motion to modify the injunction, which last motion prevailed. Appellant having had a hearing, in respect to the injunction, in the trial court, can not be heard to complain here of want of notice. O'Kane v. W. End Dry Goods Store, 72 Ill. App. 297.

By the terms of the lease, it could only be terminated prior to the end of the term created by it, either by the lessee, appellee, becoming ousted or dispossessed of the premises, or some material part thereof, in which case appellant, the lessor, might, at its option, terminate the lease; or by the default of appellee in the performance of any of the covenants of the lease by him to be performed. It is alleged in the bill that he, appellee, has been in the possession of the premises ever since the execution of the lease, and that when notified by appellant of the cancellation of the lease, he was not in default under any of the terms and provisions of the lease. These allegations must, in the present state of the case, be assumed to be true. No cause, therefore, existed for the cancellation of the lease. Appellee was not ousted from any part of the premises, nor was he in default. Under these circumstances he was entitled to dividends on his stock, and appellant had not the right either to withhold his dividends or sell his shares of stock. Assuming the allegations of the bill to be true, which, as before stated, must be done, the sale of the stock was a fraud, and appellant is entitled not only to the par value of the stock, but to all dividends which it had earned. In the original bill it is positively averred that the dividends

on his nine shares of stock, declared and payable, exceed \$450, and in an amendment to the bill filed in further support of the injunction, at the time when appellant moved for its modification, and before the present appeal was perfected, it is alleged, on information and belief, that appellant has made, since its organization, a net profit of \$475,000; that there are 455 shares of stock issued; making the profit on each share \$1,044; and that appellant has received on his nine shares only \$1,012.50, leaving due him as profits on his shares, \$8,375.50. What the shares are worth depends, of course, on the profits of appellant; and we are of opinion that a court of equity has jurisdiction in the premises for the purpose of investigating as to the profits or net earnings of appellant, and thus ascertaining the value, including earnings, of appellee's shares. If appellant's net profits were so large as alleged, and its business of the character alleged, its accounts must be numerous and complicated. The holder of income bonds of a railroad company, the interest on the bonds being payable out of the net income of the road, can maintain a bill for an accounting in order to ascertain how much the complainant should receive, as owing for interest earned on the bonds. *Barry v. Missouri, etc., Ry. Co.*, 34 Fed. Rep. 829; *Spies v. Chicago & E. I. R. R. Co.*, 40 Ib. 34.

A shareholder, when a dividend has been declared, as is alleged to have been done in the present case, can maintain a bill in equity for an accounting. 2 Cook on Corporations, Sec. 542.

The order will be affirmed.

John Skinner et al. v. J. C. Osgood.

1. GAMBLING—*What is Not an Option Contract.*—An agreement to buy 650 shares of stock in an incorporated company and pay for them at par on or before a given day, provided the party selling shall first notify the party buying, in writing, at his office in the city of New York, on or before a day named, of his election to sell said stock, is not an option contract within the prohibition of the statute.

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2. NOTICE—*When Unnecessary.*—Where a party entitled to notice under a contract refuses to perform on his part on the ground that the contract is illegal, he waives the necessity of a notice under its provisions.

3. CONTRACTS—*Construction—Intention of the Parties.*—When, from an examination of the writing itself, the intention of the parties can be clearly ascertained, a court of law will give effect to such intention.

Assumpsit, on a contract in writing. Trial in the Circuit Court of Cook County; the Hon. EDMUND W. BURKE, Judge, presiding. Finding and judgment for defendant; appeal by plaintiff. Heard in this court at the October term, 1898. Reversed and remanded with directions. Opinion filed June 29, 1899.

Statement.—A contract with appellants was entered into by appellee which is in the following terms:

“Memorandum of agreement made this 28th day of July 1890, by and between Emerson & Skinner, Dunfermline, Ill., and J. C. Osgood, acting on behalf of the Whitebreast Fuel Co. Emerson & Skinner agree to sell and convey to J. C. Osgood or his assigns, the following property: The Liverpool Railway Co., the mine and all equipment, material and supplies now owned and operated by them at Dunfermline, including the store building, miners’ houses, etc.; the lease to 640 acres of land, between John Fisher and Emerson & Skinner; the sixty acres of land owned by Emerson & Skinner, west of the Liverpool Coal Railway; the stock of goods contained in Skinner & Emerson’s store at Dunfermline; the rights to Leg mining machine for Fulton Co., Ill.; the mine right for the Harris mining machine. J. C. Osgood agrees to pay for the foregoing property as follows: \$10,000 cash, on the execution of the papers hereafter referred to, and at the same time to give his two promissory notes, dated August 1, 1890, payable on or before one and two years from date respectively, for \$12,500 each, with interest at six per cent per annum from date until paid, secured by mortgage on said mining equipment, leasehold, railway, and the sixty acres of land aforementioned, and transfer to Emerson & Skinner, or to such persons as they may direct, 650 shares of the par value of \$100 each, of the full paid, non-assessable capital stock of the Whitebreast Fuel Co.; also to pay in addition for the transfer of the Leg mining machine rights, as aforesaid, the sum of \$2,000 cash.

J. C. Osgood further contracts to pay for the stock of goods in store as soon as invoiced, the amount of such invoices at cost prices, with freight added. J. C. Osgood or his assigns are to be put in possession of the property aforesaid on August 1st, on or after which date it shall be operated for and under the direction of himself and his assigns. Emerson & Skinner agree as soon as practicable, not later than August 15, 1890, to assign and transfer the property aforesaid, by deed, bill of sale and assignment, sufficient to invest J. C. Osgood or his assigns with a full and uncontested title to said property. J. C. Osgood agrees to deliver to said Emerson & Skinner an agreement obligating himself to purchase from the said Emerson & Skinner the stock of the Whitebreast Fuel Co. as part consideration of their property, provided they elect to sell said stock, by written notice to him on or before August 1, 1891, and receive and pay for the said stock its par value on or before October 1, 1891.

It is understood that J. C. Osgood shall purchase from Emerson & Skinner, and pay for them cost and freight, for a carload of powder which they have ordered. It is understood that the papers conveying title to the stock of goods in store and the rights to the Leg mining machine shall not be placed in escrow, but be placed and executed at the time of delivery of the same. The parties heretofore agree to execute such further writings or agreements as may be necessary to carry out the objects of this agreement."

And a few days later a second written agreement in relation to the same subject-matter was executed by the same parties, which is as follows:

"THIS AGREEMENT, made and entered into this first day of August, A. D. 1890, by and between J. C. Osgood, of New York, in the State of New York, first party, and William H. Emerson and John Skinner, of Fulton county, Illinois, witnesseth:

That whereas the said second parties have this day sold, conveyed, transferred and delivered to Glenn W. Traer, as trustee for said first party, the property known as the Dunfermline Mine, situated on section twenty-three (23), township six (6) north, range (4) east of the 4th P. M., in Fulton county, Illinois, together with all the buildings, dwelling houses, machinery, tools, equipment, supplies and property of every kind and nature in and about and belonging to said mine, and also the leasehold right to mine and remove the coal underlying

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said section twenty-three (23) above described, and have also conveyed to said first party sixty (60) acres of land, being a part of the east half ($\frac{1}{2}$) of the northeast quarter ($\frac{1}{4}$) of section twenty-two (22), township six (6) north, range four (4) east of the 4th P. M., in Fulton county, Illinois, together with all buildings and improvements thereon, and also the property known as the Liverpool Coal Railway, forming a connection between the Chicago, Burlington & Quincy Railroad on section fifteen (15), township six (6) north, range four (4) east of the 4th P. M., and the above described mine.

And whereas said first party has delivered to said second parties in payment for the property above conveyed, transferred and delivered to him, six hundred and fifty (650) shares of the par value of one hundred dollars (\$100) each, of the fully paid, non-assessable stock of the White Breast Fuel Company, a corporation organized and existing under and by virtue of the laws of the State of Iowa, the receipt whereof is hereby acknowledged.

Now therefore, in consideration of the foregoing, said first party does hereby agree and obligate himself to purchase from said second parties the above described six hundred and fifty (650) shares of stock, and pay for the same at par on or before the first day of October, 1891; provided, however, that said second parties shall first notify said first party in writing at his office at number eighteen (18) Broadway, in the city of New York and the State of New York, on or before the first day of August, 1891, of their election to sell said stock to said first party hereunder.

It is agreed that time is of the essence of this contract, and that unless written notice as above set forth is served by said second parties or their agent, duly authorized, on said first party, then said first party shall be relieved from any and all obligations to purchase said stock from said second parties hereunder.

Witness the hands and seals of the parties hereto, this first day of August, A. D. 1890.

J. C. OSGOOD, [SEAL]
WILLIAM H. EMERSON, [SEAL]
JOHN SKINNER. [SEAL]

Later the following letter was sent by appellee to one of appellants:

“ NEW YORK, August 27th, 1890.

MR. W. H. EMERSON, Astoria, Ill.:

DEAR SIR: I have your letter of the 13th inst. It is in accordance with my understanding that under the agree-

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ment I have made with Mr. Skinner and yourself for the purchase of Whitebreast Fuel Company stock, I will buy the stock of either of you, should one wish to sell and the other not. You can attach this letter to the contract, which I think will be sufficiently binding on me. Have you been offering your stock for sale in New York? Mr. Tobey, a stock broker, has been hawking the stock around. The amount, 325 shares, leads me to believe it is either yours or Mr. Skinner's. I trust I am mistaken, for it seems to me it would have been courteous for you to let me know if you desired to sell the stock. As I told you, there is no active market for the stock, there having been none offered for sale, and under the present condition of the money market, there are few, if any, investors. It is possible Mr. Tobey was simply trying to see what he could get for the stock without intending to sell it, but in a close corporation like ours, not widely known, it does not do the stock any good to have it hawked around as he has done.

Yours truly,
J. C. OSGOOD."

On July 7, 1891, the American Trust and Savings Bank, acting under power of attorney for appellants, sent the following notice to appellee:

"DEAR SIR: Under a contract with Messrs. John Skinner and Wm. H. Emerson, dated Aug. 1, 1890, you have agreed to purchase from them 650 shares of the Whitebreast Fuel Co.'s stock, which was originally given them in partial payment for purchase of mines, and are in certificates, as follows:

No. 102, 100 shares.
No. 103, 100 shares.
No. 104, 100 shares.
No. 183, 25 shares.
No. 105, 100 shares.
No. 106, 100 shares.
No. 107, 100 shares.
No. 184, 25 shares.

The contract provides that in case they desire to avail themselves of the option to sell, they are to notify you on or before August 1, 1891, and accordingly, per authority vested in me by power of attorney, I hereby notify you that they desire you to purchase and pay for, August 1, as per contract, the 625 shares of stock. The same will be forwarded to you through our bank, the National Bank of the Republic.

Signed by G. B. SHAW,
President."

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The contract was carried out by appellee in all respects except that he refused to purchase and pay for the 325 shares of stock which constituted the portion of appellant Skinner. This he refused to do upon the ground that the contract was illegal, being merely a contract for an option, and upon the further ground that Skinner had engaged in the coal business after the making of the contract in question.

For breach of the contract by appellee this suit was brought.

The only defense relied upon was that the contract was a contract for an option and illegal under the provisions of Sec. 130 of the Criminal Code, and that the notice sent by the attorney in fact of appellants to appellee was insufficient in that it specified 625 shares of the stock instead of 650 shares.

A jury was waived, and the issues were submitted to the court. The court found the issues for the defendant, appellee. The court held, upon propositions of law submitted, that the notice was sufficient, that appellee having refused to purchase upon the ground that the contract was illegal, the sufficiency of the notice was unimportant, and, in effect, that a recovery could not be had by appellants because the contract for the purchase of the stock was illegal under the provisions of Sec. 130 of the Criminal Code.

From judgment upon the finding of the issues for the appellee this appeal is prosecuted by appellants.

JOHN S. WINTER and CRATTY, JARVIS & CLEVELAND, attorneys for appellants.

Section 130 of the Criminal Code is in derogation of the common law and is highly penal, and hence must be strictly construed. It should not be extended to cases not clearly within its terms. Hall v. Irwin, 2 Gilm. 176, 184; Pickering v. Misner, 11 Ill. 597; Thompson v. Weller, 85 Ill. 197; Chicago v. Rumpff, 45 Ill. 90.

The defense is that the parties violated a criminal statute, that is, committed a criminal offense. To sustain such

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defense it is necessary to make out a case sufficient to convict the parties if on trial under indictment. Germania Fire Ins. Co. v. Klewer, 129 Ill. 599; Sprague v. Dodge, 48 Ill. 142; Harbison v. Shook, 41 Ill. 141; Crandall v. Dawson, 1 Gilm. 556; McConnell v. Del., etc., Ins. Co., 18 Ill. 228.

The contract should not be held void unless the parties could be indicted and convicted for making it, since it is the violation of the statute which makes the contract void.

The court should not be controlled in construing the contract by any particular phrase or language, but should consider the entire transaction and the two contracts in determining the real intent and agreement of the parties. Minnesota Lumber Co. v. Whitebreast Coal Co., 160 Ill. 85.

CHESTER M. DAWES and WM. McNETT, attorneys for appellee.

The contract for the right to sell the stock back to Osgood was in form a contract for an option to sell within the ordinary meaning of the term "option," and the definitions given in standard lexicons, and approved in the following cases: Tenney v. Foote, 4 Ill. App. 494, 95 Ill. 99; Schneider v. Turner, 30 Ill. 28; Webster's Dictionary, the word "option."

"Whoever contracts to have, or to give to himself or another the option to sell or buy at a future time any grain or other commodity, stock of any railroad or other company, or gold * * * shall be fined, etc., * * * and all contracts made in violation of this section shall be considered gambling contracts, and shall be void." 1 Starr & Cur. Stat., p. 791.

MR. PRESIDING JUSTICE SEARS delivered the opinion of the court.

But two questions need be considered upon this appeal, viz: first, whether this contract comes within the prohibition of Sec. 130 of the Criminal Code, as a gambling contract, and second, whether the error in the notice of election to sell the stock according to the provisions of the contract will bar a recovery.

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In the determination of the first question indicated, we regard the recent decision of the Supreme Court in *Wolf v. Nat. Bank*, 178 Ill. 85, as controlling. In that case, which was merely a contract of purchase, with privilege of reselling at option of the purchaser, the court said:

"In other words, the bonds were turned over by the bank to the plaintiff at a certain stipulated price, with the distinct agreement that the plaintiff had the right, during the month of January, 1897, to elect whether he would keep them or return them to the bank, and in case he concluded to return the bonds, he was entitled to receive his money back with interest. The transaction was one both reasonable and proper, and one not within or prohibited by the statute. Indeed, it contains no element of a gambling contract."

In the case here, as in the one cited, the privilege of reselling upon election was made a condition to the original transaction, and without such privilege it is to be concluded from the evidence that the stock would not have been accepted by appellants. Indeed, the facts of this case are much stronger for the legality of the contract than were the facts in the case cited; for in this case the giving of the option to resell was an incident to an otherwise perfectly valid contract, including many important elements of transfer of other property, etc. Under the authority of *Wolf v. Nat. Bank*, we hold that the part of this contract granting the privilege to resell is but an incident or condition to a valid contract, and that it is not within the prohibition of the statute.

The only other question to be considered is as to the sufficiency or necessity of the notice.

It seems apparent from an inspection of the notice, that it was intended to require a carrying out of the contract to repurchase all of the shares of stock in question, viz., 650 shares, and not merely 625 shares, the number mentioned in the latter part of the notice, and that the latter mention was a mistake. The shares specified in the notice in detail amount to 650, and the expression "the 625" can only be read intelligently as referring back to the shares specified, *i. e.*, 650. It is contended by counsel that the court can not

disregard the mistake and read the notice as intended by the parties. If the mistake was latent, not apparent on the face of the instrument, and such that it would be necessary to resort to evidence *dehors* the writing to correct it, the contention would be sound; but when, from an examination of the writing itself, the intention of the parties can be clearly ascertained, a court of law will give effect to the intention, notwithstanding there may be some language used which, taken by itself, would not authorize the construction adopted. *Mercantile Ins. Co. v. Jones*, 87 Ill. 199; *Holmes v. Parker*, 25 Ill. App. 225; *Bishop on Contracts*, Sec. 383, 397, 420.

We are of opinion that the notice should be construed as an offer of the 650 shares of stock.

But aside from the terms of the notice, we do not regard the sufficiency of it as vital to a right to recover. Appellee, by refusing to carry out his contract upon the ground that it was illegal, and that Skinner had entered into competition with him in the coal business, waived any necessity of a notice under the provisions of the contract. After he had announced his refusal to comply with the contract, a demand would have been of no consequence. *Lyman v. Gedney*, 114 Ill. 388.

The many decisions in insurance suits as to waiver of notice would seem by analogy to apply here.

The trial court held upon propositions of law submitted, and we think rightly, both that the notice was sufficient and that the necessity of any notice was waived.

The judgment of the Circuit Court is reversed and the cause is remanded, with directions to the Circuit Court to enter a judgment in favor of appellants and against appellee for the amount shown by the evidence to be due to appellants upon the contract, viz., \$32,500, with interest at the rate five per centum per annum from October 1, 1891. Reversed and remanded with directions.

McDonald v. I. C. R. R. Co.

William F. McDonald v. The Illinois Central R. R. Co.
and The Chicago & N. W. Ry. Co.

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1. APPELLATE COURT PRACTICE—*Where the Justices Are Unable to Agree.*—Where one of the justices of the Appellate Court can not participate in the consideration and decision of a cause by reason of his relations with the counsel for one of the parties, and the remaining justices are unable to agree, the judgment will be affirmed by a divided court.

Action for a Conspiracy.—Trial in the Circuit Court of Cook County; the Hon. GEORGE W. BROWN, Judge, presiding. Judgment for defendants on demurrer to the declaration; plaintiff abides by his declaration and brings error. Heard in the Branch Appellate Court at the March term, 1899. Affirmed by a divided court. Opinion filed July 11, 1899.

WILLIAM J. STRONG, attorney for plaintiff in error.

C. V. GWIN, attorney for Illinois Central R. R. Co.; JAMES FENTRESS, of counsel.

E. E. OSBORN, attorney for Chicago & North Western Railway Company; A. W. PULVER and LLOYD W. BOWERS, of counsel.

PER CURIAM.

Mr. Justice Horton could not participate in the consideration and decision of this cause by reason of his relations with one of the counsel for plaintiff in error.

The remaining justices are unable to agree, and the judgment must therefore be affirmed by a divided court. No opinion can therefore be filed. Affirmed.

Harriet A. Roberts v. American Bonding & Trust Co.

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1. PRINCIPAL AND SURETY—*Principal May Be Compelled to Pay the Debt.*—A surety can not be required to wait until he has made payment before he may go into equity and compel his principal to pay the debt.

2. SURETIES—*Have the Right to be Protected from Loss.*—A surety

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has the right, as against his principal, to be protected from loss by reason of his suretyship, so far as it can be done without prejudice to the rights of the creditor.

3. SAME—*Upon What the Doctrine Rests.*—The doctrine in such cases rests upon the simple right, as between the principal and surety, that the surety has to be protected by the principal. The form in which that protection may be secured is not material where the right to it exists, and it can be had without prejudice to the creditor.

4. SAME—*Duty of the Principal.*—The obvious duty of the principal to perform must exist before its performance will be enforced, and if added to that there is the prevention from circuity of action, a plain case ordinarily exists.

Appeal from an Interlocutory Order appointing a receiver, entered by the Circuit Court of Cook County; the Hon. ELBRIDGE HANKEY, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1899. Affirmed. Opinion filed July 11, 1899.

GILBERT & FELL, attorneys for appellant.

PAM, DONNELLY & GLENNON, attorneys for appellee.

A surety may, when the debt of his principal is due, without paying it, come into a court of equity and maintain a bill for the purpose of compelling his principal to pay the debt, and for that purpose to apply property which should equitably be used in the discharge of that indebtedness. *Moore v. Topliff*, 107 Ill. 241; *Street v. Chicago Wharfing Co.*, 157 Ill. 605; *Ridgeway v. Potter*, 114 Ill. 457; *Dobie v. Fid. & Cas. Co. (Wis.)*, 70 N. W. Rep. 482; *Neal v. Buffington (W. Va.)*, 26 S. E. Rep. 172; *Irick v. Black*, 17 N. J. Eq. 189; *D. L. & W. R. R. v. Oxford Iron Co.*, 38 N. J. Eq. 151, 153.

MR. JUSTICE SHEPARD delivered the opinion of the court.

This is an appeal from an interlocutory order appointing a receiver to take charge of and preserve certain first mortgage bonds issued by the Merrimac Building Company and delivered to appellant in payment for certain real estate belonging to the estate of appellant's deceased husband, and sold by appellant to one Fuller. Although there were several defendants to the bill, Harriet A. Roberts alone appeals.

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According to the bill of complaint, appellant's husband, William Roberts, died possessed of certain real estate which by his will he devised to her. Such devise was subject to debts which might be proved against the estate of said William Roberts, deceased. But appellant wished to sell said real estate before the elapsing of the period within which debts against said estate might be proved, and she procured a purchaser thereof in one George A. Fuller, who, however, would not accept a conveyance thereof, and pay therefor, except upon being indemnified against debts which might be proved against said estate. For the purpose of so indemnifying said Fuller, appellant, as principal, and appellee as surety, entered into an indemnifying bond to said Fuller in the penal sum of \$70,000. Thereupon Fuller accepted a conveyance from appellant, and delivered to her first mortgage bonds, made by the Merrimac Building Company, of the face value of \$70,000, secured upon other premises. To indemnify appellee in part for executing said bond, appellant delivered to appellee and appellee now holds \$15,000, at par value, of said Merrimac Company bonds.

Subsequently, claims aggregating several thousand dollars were proved and allowed against the estate of said Roberts, deceased, which appellant failed to pay; and it is alleged that said estate being insolvent, except for the said real estate devised to and so sold by appellant, she, the appellant, as executrix of her husband's will, filed her petition in the Probate Court of Cook County, wherein the matter of said real estate is pending, to sell said real estate to pay debts, etc.

The bill alleges, *inter alia*, that appellant was appointed by the will of her husband executrix thereof, without bond; that she has disposed of some of the bonds received by her for said real estate and is endeavoring to dispose of others; that she is wholly insolvent, and that said real estate so sold by her is liable for the debts of her husband's estate, and if sold therefor in the proceedings so begun for that purpose, appellee will be bound to indemnify the said Fuller, who purchased the same, and unless the bonds

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received by appellant for said real estate shall be applied in payment of said debts, appellee will suffer irremediable loss; and proceeds upon the theory that the bonds received by appellant for the real estate should in equity and good conscience stand, be held and applied for the purposes for which the real estate itself is bound. And to that end appellee offers to bring into court the \$15,000 of said bonds so received by it from appellant, and to abide by such decree in reference to the application thereof as the court may direct, and asks that the receiver may take and apply the bonds in possession of appellant for the same purpose.

The decretal order appointing a receiver recites that the appellant, with other defendants to the bill, were present in open court, and that the court heard evidence in open court, and then proceeds to find, among other things, that all of said bonds in the possession of appellant and certain other persons constitute a part of the estate of said Roberts, deceased, and should be applied in payment of the debts of said estate; that appellant has filed her petition to sell the real estate, as charged in the bill, and that appellee is entitled to have said bonds applied in payment of the proved debts of said estate.

The brief for appellant says, and there is no other suggestion made for a reversal of the order:

"The question here presented is purely and simply whether a surety on a bond, fearing that the principal may not perform the condition thereof, may, without himself satisfying the bond and bringing his suit at law against the principal, come in the first instance into a court of equity, tie up the principal's hands by injunction, restraining him from disposing of any of his property, secure the appointment of a receiver therefor, and obtain a decree requiring the condition of the bond to be satisfied out of the principal's property; this, too, when the principal has delivered to him, as indemnity for his suretyship, bonds, the face value of which confessedly exceeds the actual liability of the surety on the bond and which are not shown to be insufficient for that purpose."

Nothing concerning an injunction is before us. The appeal is only from the order appointing a receiver.

Roberts v. American Bonding & Trust Co.

The claims that have been reduced to judgment against the estate of William Roberts, deceased, in the Probate Court, are liens upon the real estate sold and conveyed by appellant to Fuller, and are the very liens that the bond to Fuller, from appellant, with appellee as surety, was given to furnish indemnity against. The condition of said bond is express, that appellant shall, prior to a date that had elapsed before the bill was filed, "pay or cause to be paid and discharged, all costs of administration of said estate, and all debts of the said William Roberts that have been or may hereafter be proved, or be provable, against the estate of said William Roberts."

As between appellant the principal, and appellee the surety, appellant's duty was to pay the judgment of the Probate Court. The land she had sold and been paid for is the only asset of the husband's estate out of which the judgments can be made, and she, as executrix, has begun proceedings to have the land sold to pay those judgments.

According to the terms of the bond given to the purchaser of the land, a breach of the bond seems already to have occurred. Must appellee wait until judgment has been recovered against it for such breach before it can compel appellant to do her duty? It would seem not to be necessary to do so. There is nothing unliquidated or uncertain in amount. The judgments of the Probate Court exactly determine the debts of the estate of Roberts, deceased, against which Fuller was indemnified.

Nor do we think it necessary that appellee should first pay either Fuller or the Probate Court judgments that threaten Fuller's title before appellant may be required to perform her legal and equitable duty. Fuller's land is liable for those judgments, and both appellant and appellee are obliged to protect him against them. In respect of such obligation, as between themselves, appellant is principal and therefore primarily liable.

Both appellant and appellee hold a part of the mortgage bonds that were taken by appellant in payment for the

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land, and on their part nothing would be more equitable than a putting by them of said bonds, in lieu of the land, to satisfy the judgments. What is more equitable than that, instead of having circuity of action, appellee may require appellant to bring into court her bonds there to be applied, along with those held by appellee and offered to be brought into court, under equitable rules, toward satisfying their joint liability?

We think this is clearly a case where the surety shall not be required to wait until he has made payment before he may go into equity and compel the principal to pay the debt.

It is a familiar doctrine of equity that a surety has the right, as against his principal, to be protected from loss by reason of his suretyship, so far as it can be done without prejudice to the rights of the creditor.

And so equity will sometimes interfere and compel the principal to exonerate the surety, in advance of payment by or judgment against the surety, if the debt is due and it can be done without prejudice to the rights of the creditor. The doctrine in such cases rests upon the simple right, as between the principal and surety, that the surety has to be protected by the principal. The form in which that protection may be secured is not material where the right to it exists and can be had without prejudice to the creditor.

The obvious duty by the principal to perform must of course exist before its performance will be enforced, and if added to that there be the prevention from circuity of action, a plain case ordinarily exists.

The principle, as variously applied, is more or less fully announced in Irick v. Black, 17 N. J. Eq. 189; Stephenson v. Taverners, 9 Grat. (Va.) 398; Moore v. Topliff, 107 Ill. 241; Chicago W. & S. Co. v. Street, 54 Ill. App. 569; same case (title reversed), 157 Ill. 605; Dobie v. Fidelity & Casualty Co. (Wis. 1897), 70 N. W. Rep. 482.

Here the duty of the appellant has been established by the judgments that have been rendered against her hus-

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band's estate in the Probate Court, and she not having paid them, a breach of the bond to Fuller has occurred.

The extent of liability and appellant's duty concerning it having become fixed, the case before us falls within the sphere of equitable interference in behalf of appellee.

The order of the Circuit Court appointing a receiver of the bonds is affirmed.

Chicago & E. I. R. R. Co. v. Florence Myers, Adm'x.

1. FELLOW-SERVANTS—*Negligence—Proofs Necessary to a Recovery.*

—To entitle a recovery for an injury resulting from the negligence of a fellow-servant, the plaintiff must prove that the servant was incompetent and that his master employed him, or retained him in his employ, either with actual knowledge that he was incompetent, or under such circumstances that he is legally chargeable with such knowledge, and that the injury is the result of the servant's negligence.

2. MASTER AND SERVANT—*Presumptions as to the Selection of Servants.*—The presumption is that the master exercised proper care in the selection of his servants.

3. PRESUMPTIONS—*From a State of Facts Shown to Have Existed.*—A state of facts once shown to exist is presumed to continue until the contrary is made to appear.

4. SAME—*Where the Master in the First Instance Exercises Proper Care in the Selection of Servants.*—The master having in the first instance exercised proper care in the selection of servants, and such servants, at the time of their employment, having been suitable for the business, these qualifications are presumed to continue until either he has actual notice of a change in the servants' qualifications, or is shown to have knowledge of such facts as are equivalent to notice, and would put a reasonably prudent man on his guard.

5. EVIDENCE—*Of Incompetent Servants.*—A single act or omission is not sufficient to prove incompetence of an employe, but it may, under some circumstances, show him to be an improper and unfit person for a position of trust, or any particular service; as, when an act is done wantonly, regardless of consequences, or maliciously, it may be such as to furnish an unerring index of the character of the employe, and when considered by itself or in connection with the circumstances surrounding it, be sufficient to demonstrate his unfitness to be placed in any position requiring great or even ordinary care in the discharge of its duties.

6. EMPLOYES—*Single Acts of Forgetfulness.*—An individual who by

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years of faithful service has shown himself trustworthy, vigilant and competent, is not proved either incompetent, careless or untrustworthy by a single mistake or act of forgetfulness, or omission to exercise the highest degree of caution and presence of mind.

Action in Case.—Death from alleged negligence. Trial in the Superior Court of Cook County; the Hon. FARLIN Q. BALL, Judge, presiding. Verdict and judgment for plaintiff; appeal by defendant. Heard in this court at the October term, 1898. Reversed and remanded. Opinion filed June 29, 1899.

WILL H. LYFORD, J. B. MANN and ALBERT M. CROSS, attorneys for appellant.

Proof of one act of negligence does not even tend to prove incompetency of a servant. Holland v. S. P. Ry., 100 Cal. 240; Dysart v. K. C., Ft. S. & M. Ry. (Mo.), 46 S. W. Rep. 750; Baulec v. N. Y. & H. R. Ry., 59 N. Y. 356; Baltimore E. Co. v. Neal, 65 Md. 438; Cosgrove v. Pittman (Cal.), 37 Pac. Rep. 232; Wharton on Negligence, Sec. 238; McKenney on Fellow-servants, Sec. 91, p. 203; Western Stone Co. v. Whalen, 151 Ill. 472.

MUNSON T. CASE, attorney for appellee.

“The degree of care to be exercised by a master in the selection of servants * * * is such as is reasonable and proper in view of the nature and character of the business and the consequences likely to result from a negligent or unskillful execution of the work.” Wood on Master and Servant, Sec. 418.

MR. JUSTICE ADAMS delivered the opinion of the court.

This is an appeal from a judgment for \$1,600 against appellant in favor of appellee, for alleged negligence causing the death of appellee's intestate, John B. Myers. The declaration contained five counts, four of which were eliminated from the consideration of the jury by instructions, leaving only the second count, which, as amended, is substantially as follows:

Deceased in his lifetime was in the employ of the defendant as a brakeman upon a certain freight train, being moved in a northerly direction, between the stations Cayuga and

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Perrysville, and it was the defendant's duty to exercise ordinary and reasonable care in the selection of its servants, both engine men and trainmen, on said freight train, and also its passenger trains, which defendant was operating over said road, with whom it might become necessary for deceased to work in the movement of said freight train. Yet, defendant, disregarding its duty to deceased, carelessly and negligently employed, as engineer of one of said passenger trains being moved in a northerly direction behind said freight train between said stations, a careless, incompetent and unskilled servant, when defendant knew, or by the exercise of reasonable care should have known, said servant was careless, unskilled and incompetent, *and the defendant negligently retained said servant, to-wit, said engineer, in its employ, after it knew that said servant was careless, incompetent and unskilled;* that thereby deceased, while exercising ordinary care for his own safety, and while performing his duties as said brakeman on said freight train, which had become stalled upon defendant's road, and which was being moved or attempted to be moved by the freight engine thereto attached and the passenger engine of said passenger train, upon which said careless, incompetent and unskilled servant was employed as engineer (deceased), was, by reason of the lack of skill and incompetency and carelessness on the part of said engineer in performing his duties, and in the negligent and careless application of the air brake on said passenger engine, which caused the breaking of the coupling of said engine, thrown with great force and violence from a certain gondola car, one of the cars being pushed by said passenger engine, to and upon the ground, and upon, to wit, a certain side track of defendant's railroad, his leg and body being run over by the wheels of said car, and he sustained mortal injuries, from the result of which he shortly thereafter died.

The part of the count italicized was added as an amendment after the evidence was all in, and after counsel for plaintiff had addressed the jury and counsel for the defendant had proceeded with his argument for some time.

Appellant pleaded the general issue and the statute of limitations to the count as amended. The suit was commenced November 14, 1895, and the trial occurred in February, 1898. The court sustained a demurrer to the plea of the statute. Appellee's intestate was a brakeman on a freight train of appellant consisting of an engine, thirty-three cars loaded with coal and a caboose. September 25, 1894, between twelve and one o'clock A. M., near a station called Dickason, in Vermilion county, in the State of Indiana, while ascending a considerable grade on the main track in a northerly direction, for the purpose of taking a side track to allow a passenger train which was following the freight train to pass, the freight train came to a dead stop, which was necessary in order to have a brakeman run ahead and turn the switch into the siding. When the switch was turned an attempt was made to start the train, which was unsuccessful, by reason of the fact that the rails were so wet and slippery that the wheels of the engine merely spun around on them in one place without moving forward. Rutherford, the conductor of the freight train, then sent Myers back to flag the approaching passenger train, which he did, and when that train came up Rutherford requested Burley, the engineer of that train, to couple on to the rear of the freight train and help to move it up the grade and into the siding.

The passenger train consisted of an engine, a baggage car, two coaches and a sleeper. Myers coupled the engine of the passenger train to the rear of the freight train, using for that purpose the pilot bar of the engine. The engine was not detached from the cars which it was moving. Both engines were then started and after the freight train had been moved by them from 500 to 700 feet, Rutherford, the conductor of the freight train, thinking that the engine of his train could complete the work, pulled the pin out of the pilot bar and the passenger train stopped. The consequence of disconnecting the passenger engine from the freight train was that the slack between the freight cars, which the passenger engine had been pushing, ran out, the cars

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ran downward and backward, and the freight train was broken in two sections. The rear section, consisting of five cars and the caboose, remained on the main track, and the forward section was pulled into the siding by the freight engine. Rutherford then requested Burley to hitch on to the rear section of the freight train and push it into the siding. Burley coupled on as requested; Myers went to the front platform of the forward car of the section, which was a gondola car, with a platform about six inches wide, and stood on the east side of the platform. Rutherford went to and stood on the east steps of the platform of the caboose. Burley then started his engine, and after the cars had moved about 500 feet, at a speed of about five miles per hour, Rutherford received a signal from Myers which he understood to be a "go slow" signal, and says he passed it back to Burley. Either some other signal was given, or Burley mistook the one given, and applied about ten pounds air pressure to the brakes, when the passenger engine and cars stopped short. The effect of the sudden stoppage of the passenger engine, coupled with the momentum of the freight cars, was to break the eye of the pilot bar connecting the engine and caboose, and cause a jerking of the freight cars. At the time this jerking occurred Rutherford says that he saw Myers' lantern go over, and immediately went forward and found Myers lying on the west side of the track, about the length of two rails from the switch, with his leg off. He died shortly afterward as a result of his injuries.

To entitle appellee to recover, it was incumbent on her to prove that Burley, the engineer of the passenger train, was an incompetent engineer; that appellant employed him, or retained him in its employ, either with actual knowledge that he was incompetent, or under such circumstances that appellant is legally chargeable with such knowledge, and also that the injury to appellee's intestate was caused by his negligence. Our view of the case, after careful consideration of the evidence, is such that we do not deem it necessary to pass on the question whether Burley was guilty of

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negligence at the time of the accident. There is no evidence of Burley's incompetency prior to the time of his employment by appellant. John McClure, a locomotive engineer of twenty-seven years standing, testified that he and Burley were born and brought up in the same town; that Burley became a railroad engineer in 1871, and operated an engine on the Pennsylvania Railroad until the fall of 1882, and on the Wabash Railroad from the latter time until July 4, 1894, at which last time he, the witness, saw and rode with him. Rutherford testified that he was employed by appellant about the latter part of August or first of September, 1894, but is not certain whether Burley was employed by appellant before he was or not. If he worked for the Wabash road until July 4, 1894, he must have been employed by appellant shortly after that date, because the evidence shows that he had been in appellant's employ some time prior to September 25, 1894, when the accident occurred. He had, therefore, been engaged as a railroad engineer about twenty-three years when he was employed by appellant. This fact of itself is *prima facie* evidence that Burley was a competent engineer when employed by appellant. But such proof, on the part of appellant, is not required, the presumption being, in the absence of evidence to the contrary, that appellant exercised proper care in employing the engineer.

In Baulec v. N. Y. & Harlem R. Co., 59 N. Y. 356, a leading case which is relied on by counsel for both the parties in the present case, the court say:

"There is no impeachment or attempt to impeach the qualification of McGerty as a switchman, except by the proof of a single occurrence several months before the occurrence in question. It is not contended that the defendant was wanting in the exercise of due care in his original employment, and it must be assumed that he was competent when employed and reasonably intelligent, and was, during all the time he was in the service of the defendant, sober, temperate, attentive to his duties, carefully, intelligently and successfully performing the services required of him, with the single exception referred to." "The presumption is that the master has exercised proper care in the selection

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of the servant." Bailey's Master's Liability for Injury to Servant, 55. See also Davis v. Railroad Co., 20 Mich. 122.

And "the master having in the first instance exercised proper care in the selection of servants, and such servants, at the time of their employment, having been suitable for the business, these qualifications are presumed to continue until either he has actual notice of a change in the servant's qualifications, or is shown to have knowledge of such facts as are equivalent to notice, and would put a reasonably prudent man on his guard." Wood on Master and Servant, Sec. 431.

"A state of facts once shown to exist is presumed to continue until the contrary is made to appear." W. Stone Co. v. Whalen, 151 Ill. 482.

Appellee relies only on a single occurrence as evidence that Burley was incompetent. Rutherford, the conductor of the freight train at the time when the accident in question occurred, testified that while operating a freight train he had occasion to pass and repass a passenger train which was hauled by Burley; that there never was any difficulty in the passing of the trains except once; that the difficulty referred to was reported to and investigated by Mr. Corwin, appellant's superintendent, at Danville; that witness said to Mr. Corwin, in Burley's presence, that the flag was out the proper distance; that the engineer passed right by the flagman and did not pick him up, and that there was a torpedo down, which exploded, which the witness heard, and which means stop on the track immediately. The witness, in his examination in chief, said that this was all he knew of; that what Corwin or Burley said on the occasion referred to, he would not be positive of, and would not like to say; that he, the witness, after reporting to Corwin, as above stated, excused himself and left; that the report was made to Corwin about a week or ten days before the accident in question. The time when the alleged difficulty, which the witness says he reported to Corwin, occurred, does not appear.

On cross-examination the witness testified as follows:

"I said to Mr. Corwin, 'Did he allow his engineers to run by flags and not pick them up, as directed by the

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rules?' He said, 'No, sir.' I told him about this case. I told him that Mr. Burley run by a flag at Hillsdale. I told him it was very foggy, and that it was necessary for him to run his train through the side track—the passenger train; that I stood on the main track with my train broken in two parts. I had been switching there, and I had plenty of time to get out of the way, but in starting to pull out and back in, I pulled out a pin, and I sent the flagman back. That is what I told Corwin, and told my brakeman to run him through the side track and pull the other switch open; that is, the second switch, open for him, and he did so, and Burley ran onto the side track all right."

Q. "And your complaint was that he did not stop and pick up the flagman?" A. "That is my complaint exactly."

Corwin, appellant's superintendent, testified that he had no recollection of any such complaint as that testified to by Rutherford; that ordinarily he would not recollect such a complaint.

Burley, at the time of the trial, was in the employ of a railroad company in Mexico, his headquarters being at San Luis. The record shows that he was sick, and for that reason appellant could not procure his attendance as a witness.

Appellee introduced in evidence certain rules, some of which are as follows:

Rule 30. "An explosive cap or torpedo, placed on the top of the rail, is a signal to be used in addition to the regular signals. The explosion of one torpedo is a signal to stop immediately."

Rule 86A. "All trains must use every exertion to pass quickly as possible, and passenger trains will take siding, when by so doing time can be saved, but when practicable freight trains must take siding, and be clear of main track at least five minutes before passenger train is due; and when necessary to keep main track, the conductor of the freight train must flag the passenger train, as per rule 99, and have switch thrown for them to take siding, which must be cleared the length of passenger train."

Rule 99. "When a train is stopped by an accident or obstruction, the flagman must immediately go back with danger signals, to stop any train moving in the same direction; at a point fifteen telegraph poles from the rear of his

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train, he must place one torpedo on the rail. He must then continue to go back at least twenty telegraph poles from the rear of his train, and place two torpedoes on the rail ten yards apart (one rail length), when he may return to a point fifteen telegraph poles from the rear of his train, and he must remain there until recalled by the whistle of his engine. But if a passenger train is due within ten minntes, he must remain until it arrives. When he comes in, he will remove the torpedo nearest the train; but the two torpedoes must be left on the rail as a caution signal to any following train."

Rule 675. Engine Men.—“They must obey all signals given, even if they think such signals are unnecessary. When in doubt as to the meaning of a signal, they must stop and ascertain the cause, and if a wrong signal is shown they must report the fact to their conductor.”

Analyzing the evidence of Rutherford, in connection with the rules, it shows the following situation: The passenger train of which Burley was engineer was about due; the freight train of which Rutherford was the conductor, was on the main track, but should then, under rule 86A, have been run onto the side track, if practicable; but this was not practicable, because, as Rutherford says, it had been broken into two sections because of his pulling a pin which it is apparent he should not have pulled. Under these circumstances he sent his brakeman back to pull open the other or second switch of the siding, which was farthest from the freight train and nearest to the incoming passenger train so that the passenger train could be run on to the siding. This the brakeman did. Under the circumstances, it was Burley's duty, under rule 86A, to take the side track; the rule in this regard being, “All trains must use every exertion to pass quickly as possible, and passenger trains will take siding when by so doing time can be saved.”

Rutherford's train being on the main track, and it being impracticable for him to run it on to the siding, for the reason stated by him, his duty, as prescribed by rule 86A, was as follows:

“When necessary to keep main track, the conductor of

the freight train must flag the passenger train, as per rule 99, and have switch thrown for them to take the siding, which must be cleared the length of the passenger train."

It must be presumed that Rutherford did his duty, and that the siding was clear the length of the passenger train. It may be legitimately inferred from the evidence that the siding was entirely unoccupied. What the flagman said to the engineer, Burley, if anything, does not appear. Appellee's counsel argues that the supposition that the brakeman said anything to Burley is negatived by the fact that Burley did not take him on his train, but it is obvious that he might have spoken to Burley without being "picked up" by the latter. Neither does it appear whether the main track was or not straight between and extending beyond the switches of the siding in each direction, or how far the switch by which Burley took the siding was from the place where the freight train was on the main track. The brakeman may have told Burley to take the main track. Rutherford says he told the brakeman to run him, Burley, through the side track. There can be no presumption that the brakeman disobeyed this direction. Burley may have seen the freight train on the main track, and must have known, either by sight, or by being told by the brakeman, that the switch onto the siding was open, because otherwise he certainly would not have taken the switch, which he did, and, as Rutherford says, ran onto the side track all right.

Burley may have been guilty of a technical violation of rules 30 and 675, *supra*, in not stopping his train immediately on the explosion of the torpedo, but it is doubtful at least, whether, in this omission, he was guilty of any substantial violation of appellant's rules. The rules must be construed together, and rule 86A provides, "All trains must use every exertion to pass quickly as possible, when by so doing time can be saved."

Rutherford's testimony that his exact complaint was that Burley did not stop and pick up the flagman, meaning the brakeman sent to flag the train, is significant. None of

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the rules in the record makes it the duty of the engineer to "pick up" a flagman under the circumstances disclosed by the evidence. The general rule, subject to an exception hereinafter noted, is that a single act or omission is not sufficient to prove incompetence. Wood on Master and Servant, Sec. 432; 1 Bailey's Pers. Injuries, etc., Sec. 1511; Wharton on Negligence, 238; Lee v. Detroit B. & I. Works, 62 Mo. 565; Holland v. S. Pac. Co., 100 Cal. 240; Baltimore El. Co. v. Neal, 65 Md. 438, 454; Baulec v. N. Y. & H. R. Co., 59 N. Y. 356.

In Holland v. S. Pac. Co., *supra*, the prior act of negligence relied on was that the engineer ran a train twelve to fourteen miles in forty minutes on a part of the road not safe for fast running, the schedule time being sixty minutes.

In the Baulec case, *supra*, the act relied on as evidence of incompetency was that the switchman changed the signal so that it indicated that the switch was right for the Harlem road, without changing the switch correspondingly, by reason of which a train was derailed.

In each case it was held, as matter of law, that the act was insufficient to prove incompetency.

The exception to the general rule is thus stated in Baulec v. N. Y. & H. R. Co.:

"A single act may, under some circumstances, show an individual to be an improper and unfit person for a position of trust, or any particular service, as when such act is done wantonly, regardless of consequences, or maliciously." P. 363.

In Holland v. S. Pac. Co., *supra*, the court say:

"It may be and doubtless is true, that a single act may be such as to furnish an unerring index of the character of the actor, and when considered by itself or in connection with the circumstances surrounding it, be sufficient to demonstrate the unfitness of a person to be placed in any position requiring great or even ordinary care in the discharge of its duties." P. 244.

Other authorities are to the same effect. We are of opinion that the omission of Burley testified to by Rutherford is not an exception to the general rule, and is insuffi-

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cient as proof of incompetency. It is to be borne in mind that negligence and incompetence are not convertible terms. One thoroughly competent may be negligent (Bailey's Pers. Inj., etc., Sec. 1509); and while a series of acts of negligence, or even a single act, may so indicate the character and mental disposition as to prove incompetency, a well qualified and entirely competent person may be negligent on occasion, without being obnoxious to the charge of incompetency.

It was incumbent on the appellee to prove an act or acts of Burley of such character that the law would impose on appellant the duty of discharging him from its service. Appellant's superintendent investigated the complaint made by Rutherford, and declined, properly, as we think, to discharge him. The law on this subject is clearly stated in Baulec v. Railroad Co., *supra*, the court saying:

“If it be conceded that the negligence of McGerty upon the prior occasion is established, it by no means follows that the defendant was bound to discharge him upon peril of being charged with neglect and a want of due care in retaining him in its service. An individual who by years of faithful service has shown himself trustworthy, vigilant and competent, is not disqualified for further employment, and proved either incompetent or careless, and not trustworthy, by a single mistake or act of forgetfulness and omission to exercise the highest degree of caution and presence of mind. The fact would only show what must be true of every human being, that the individual was capable of an act of negligence, forgetfulness or error of judgment. This must be the case as to all employes of corporations until a race of servants can be found free from the defects and infirmities of humanity.”

But even though it should be conceded that the testimony of Rutherford tended to show incompetency, we are of opinion that the preponderance of the evidence is against the proposition that Burley was incompetent. McClure, the locomotive engineer, who had known Burley from boyhood, testified that Burley worked under him from December, 1866, till July 1, 1894; that Burley's reputation for care and skill as a railroad man was good; that he, the witness,

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had ridden with him on his engine at least fifty times. Levi Nead, general foreman of the machinist department of the Wabash Railroad, testified that Burley was running under him from July 1, 1885, until July 1, 1894, and that his reputation for carefulness and skill was first class in every respect. Louis Velot, a locomotive engineer, testified that he knew Burley very well while he was on the Wabash road; that Burley was on the opposite run from him, and that he saw him every day for nearly six months; that he knew his reputation for carefulness, that it was good, and that he was a good engineer. In the examination of the witness Finn, he was asked whether the application by Burley of ten pounds of air to the brakes, about the time Rutherford testified he signaled Burley to go slow, was proper. The question was improper. The witness is an expert, and the question might have been asked him, what the probable effect of such application of air would be, under the circumstances in evidence, but whether the act of applying it was proper, was a question for the jury. *Chicago v. McGiven*, 78 Ill. 347.

We are of opinion that the court did not err in sustaining the demurrer to appellant's plea of the statute of limitations. We find no reversible error in any other rulings of the court objected to in the argument of appellant's counsel.

The judgment will be reversed and the cause remanded.

Eva Malmberg, by her Next Friend, v. William Bartos.

1. **TRESPASS—*Liability of Parent.***—A father can not be held responsible for the unauthorized trespasses of his minor children.

Action in Case, for injuries inflicted by a minor child. Trial in the Circuit Court of Cook County; the Hon. CHARLES E. FULLER, Judge, presiding. Verdict and judgment for defendant by direction of the court; error by plaintiff. Heard in the Branch Appellate Court at the October term, 1898. Affirmed. Opinion filed July 11, 1899.

BLAISDELL & McCASKILL, attorneys for plaintiff in error.

If any one using dangerous instruments, running machinery, or employing vehicles, which are peculiarly hazardous, and knows that infants, or others who have imperfect discretion are in close or immediate proximity, he will be compelled to the exercise of a degree of caution, skill or diligence, which would not be required in cases of other persons. *Gillespie v. McGowan*, 100 Pa. St. 144; *Porter v. Anheuser-Busch B. A.*, 24 Mo. App. 1; *Jonasch v. Standard Gas Light Co.*, 56 N. Y. Super. Ct. 447; *Brown v. Hannibal & St. J. R. Co.*, 27 Mo. App. 394; *Little Rock & C. Ry. Co. v. Dick*, 52 Ark. 402.

Owners of grounds are held liable for injuries resulting to children, although trespassing at the time, where from the peculiar nature and exposed condition of the dangerous defect or agent, the owner should reasonably anticipate such injury to flow therefrom. In such cases, it is held that the question of negligence is for the jury. *Virge v. Gardiner*, 19 Conn. 507; *Railroad Company v. Stout*, 17 Wall. (U. S.) 657; *Union Stock Yards and Transit Co. v. Rourke*, 10 Ill. App. 474; *Keffe v. Milwaukee & St. P. Ry. Co.*, 21 Minn. 207; *Mullaney v. Spence*, 15 Abb. Pr. (N. S.) 319; *Hydraulic Works Co. v. Orr*, 83 Pa. St. 332; *Whirley v. Whitman*, 1 Head, 610.

Where a party has in his custody or control dangerous implements or means of injury, and negligently uses them or places them in a situation unsafe to others, and another person, although at the time even in the commission of a trespass, or otherwise somewhat in the wrong, sustains an injury, he may be entitled to redress. *Kerwhacker v. C., C. & C. R. R. Co.*, 3 Ohio St. 172; *Ft. Worth & Denver City R. R. Co. v. Robertson*, 14 L. R. A. 781.

No person has a right to leave, even on his own land, dangerous machinery calculated to attract and entice boys to it, there to be injured, unless he first takes proper steps to guard against all danger, and any person who leaves dangerous machinery exposed without first providing against all danger, is guilty of negligence. *Kansas Cent.*

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R. Co. v. Fitzsimmons, 22 Kan. 686; Evansich v. Gulf C. & S. F. R. R. Co., 57 Tex. 123; Ferguson v. Columbus & R. R. Co., 77 Ga. 102; Atchison & N. R. Co. v. Bailey, 11 Neb. 333; Barrett v. Southern Pacific Co., 91 Cal. 296.

One who places a dangerous thing in a position where it is likely to cause injury to others is liable to a child who is injured, although he may be a trespasser. Binford v. Johnston, 82 Ind. 430; Lane v. Atlantic Works, 107 Mass. 106; Penn. R. R. Co. v. Lewis, 79 Pa. St. 44; Beauchamp v. Saginaw Mining Co., 50 Mich. 167; Davis v. C. & N. W. Ry. Co., 58 Wis. 656; Godeau v. Blood, 52 Vt. 251.

The conduct of an infant of tender years is not to be judged by the same rule which governs that of an adult. The care and caution required of a child is according to his maturity and capacity only, and this is to be determined in each case by the circumstances of that case. Weick v. Lander, 75 Ill. 93; Chicago v. Major, 18 Ill. 360; Kerr v. Forgue, 54 Ill. 484; Chicago v. Keefe, 114 Ill. 229.

The question, what is a dangerous thing, must be one for the jury. Whittaker's Smith on Negligence, 168.

E. C. Westwood, attorney for defendant in error.

"A father is not nor can he be held responsible for the trespasses of his minor children. In that respect the child occupies the same relation to the father as does the servant. He is liable for the acts of either, when performed under his direction, or in the course of their general employment, but not for their trespasses committed independent of their employment and not under direction." Paulin v. Howser, 63 Ill. 313; Wilson v. Garrard, 59 Ill. 51.

It is no answer to say that the defendant was negligent in leaving the axe where his son could get hold of it. In the case of Haggerty v. Powers, 66 Cal. 368, a much stronger case is presented than the one at bar.

The court there held :

"A father who willfully, carelessly, and negligently suffered his son of eleven years of age to have in his possession a loaded pistol, can not be made to respond in damages to one injured thereby, the accident having occurred through the willful act of the son, who alone is responsible for it."

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MR. PRESIDING JUSTICE FREEMAN delivered the opinion of the court.

This is an action of trespass on the case. Plaintiff in error, a child about seven years old, was injured by the son of the defendant in error, a boy of about four years, and it is sought to hold the father responsible in damages.

At the conclusion of the testimony in behalf of the plaintiff, the trial court instructed the jury to find the defendant not guilty, which was done. A motion for a new trial was overruled and judgment rendered, which plaintiff now seeks to reverse.

The defendant in error was the proprietor of a grocery store, and upon the day of the injury was unloading some ice upon the sidewalk in front of his place of business. To break up the ice he used a sharp axe or ice pick, which he left lying on the walk while he carried the ice into the store. The plaintiff, with another girl somewhat older, the defendant's son and another boy, said to have been five or six years old, were playing or standing near. Plaintiff attempted to pick up a piece of ice, and was ordered off by the defendant's four-year-old son, who told her to go away or he would "fix her." Upon her refusal the elder of the two boys seized and held her finger, while the defendant's son picked up the axe and chopped the finger off.

Counsel for plaintiff in error thus state their contention:

"The main question to be considered by the court is whether or not the defendant was guilty of negligence in leaving the axe lying upon the sidewalk in front of his store while these children were playing in close proximity thereto, or in other words, is an axe of itself a dangerous implement in the hands of children of immature years and judgment."

It is scarcely necessary to say that while an axe may be a dangerous instrument in the hands of a child, it does not necessarily follow that the defendant was guilty of negligence, or if he was, that his negligence was the proximate cause of the injury.

In this case the injury does not appear to have been caused by the mere act of leaving the axe lying on the

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sidewalk. It was not occasioned by the plaintiff's running or hitting against the axe, nor was the axe being used as a plaything. As it lay upon the sidewalk, so far as the evidence shows, the axe was perfectly harmless. Its presence there did not in itself serve to create any danger to the children or to passers-by. The mere act of leaving it temporarily upon the walk was not negligence in and of itself.

But it is said to have been negligent for defendant in error to leave the axe within easy reach and possession of his four-year-old boy, and that this negligence was the cause of the injury. This conclusion is not sustained by the evidence. The cause of the injury was not that the axe was in reach of the boy, but it was his willful intention to injure the plaintiff for trying to pick up a piece of the ice. The axe was the *means* by which the injury was inflicted, but not the *cause* of its infliction.

It does not appear that the defendant in error had any reason to suppose the axe would be so used, or that his small son would be guilty of conduct so cruel and malicious. "A father is not, nor can he be, held responsible for the unauthorized trespasses of his minor children." Paulin v. Howser, 63 Ill. 313. As is said in Wilson v. Garrard, 59 Ill. 51, "It would be unjust to hold the father responsible for the purely mischievous and willful conduct of the children, as shown by this record."

The proof fails to sustain the averments of the declaration, and a verdict in favor of the plaintiff, if returned, could not have been sustained.

Under these conditions the Circuit Court properly directed a verdict for the defendant. Simmons v. Chicago & Tomah Ry. Co., 110 Ill. 344-346.

The judgment is affirmed.

**Charles E. Deane et al., Partners as Deane Bros., v.
John A. Tolman Co.**

1. HARMLESS ERROR—*Refusing to Strike a Plea from the Files.*—Where a plea filed does not change the issues or cast upon the plaintiff any extra burden, it is an immaterial plea, but a refusal to strike it from the files is not reversible error.

2. ASSIGNMENT—*Of a Specified Fund to One Creditor Not General Assignment.*—An assignment of a specified fund to one creditor to secure his debt due is not a general assignment and is not obnoxious to the law of Illinois.

Attachment and Garnishment Proceedings.—Appeal from the Circuit Court of Cook County; the Hon. RICHARD W. CLIFFORD, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1898. Affirmed. Opinion filed July 11, 1899.

PINNEY & ORR, attorneys for appellants.

SIMS & WATERMAN, attorneys for appellee.

MR. JUSTICE HORTON delivered the opinion of the court. September 12, 1896, appellants commenced a suit in attachment before a justice of the peace against A. W. and A. M. Brist, partners as A. M. Brist & Son, and caused garnishee process to be served upon McCormick Harvesting Machine Co. Upon the trial of that cause before the justice, appellee appeared and claimed that the money due from the garnishee to the defendant in attachment had been assigned to it, and that it was entitled to the same as against appellants. The justice entered judgment against the garnishee for \$150 and against the appellee as to its claim. The garnishee appealed the case to the Circuit Court. No summons was served upon appellee, but it entered its appearance in that court. It also filed in that court its plea, setting up that it was entitled to the money or property in the hands of the garnishee.

Appellants moved to strike this plea from the files, and assign as error the overruling of such motion by the trial

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court. The appellee was not required by law to file such plea. It could have asserted its rights just the same without that plea. But no demurrer was filed to it and no issue joined upon it. It was therefore immaterial whether such plea was or was not on file. It did not change the issue or cast upon the appellants any extra burden. Even if the contention of appellants that it should have been stricken from the files were held to be correct, no harm was done them by overruling their motion, and such ruling would not be a reversible error.

Brist & Son were indebted to appellee in the sum of \$631.03 September 12, 1896, and that day assigned to appellee all moneys due to them from said garnishee. The garnishee was notified of such assignment of the money in its hands due to Brist & Son, and such assignment was exhibited to the agent of said garnishee at Millston, Wisconsin, at 6:30 o'clock P. M. of the day it was made, that is, September 12, 1896. An agent of the garnishee was served with process in Chicago the same day at 8:30 o'clock P. M. The notice by appellee to the garnishee of such assignment, and the claim of appellee to the funds in the garnishee's hands, was therefore prior in point of time to the notice by appellants, by service of the garnishee process.

It is contended by appellants that said assignment by Brist & Son to appellee was void, in that it gave preference to one creditor over other creditors. The assignment of the claim in question was not a general assignment. It was only an assignment of a specified fund to one creditor to secure a debt due to such creditor from the assignor. That is not obnoxious to the law of either Wisconsin or Illinois.

By the judgment of the Circuit Court, the claim and right of appellee to the fund in the hands of the garnishee was held to be paramount to the claim and right of appellants to that fund. No appeal is prosecuted to this court by the garnishee or by the attachment defendants.

The judgment of the Circuit Court against the appellants is affirmed.

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Frank H. Clark v. DeWitt C. Mallory, Mallory, Son & Zimmerman Co., Charles A. Mallory, Milton T. Zimmerman, Frank M. Timms, Mrs. Mary J. Mallory and The Thirty-first Street Building and Loan Association.

1. **RELEASE—By One of Several Joint Obligees.**—A mere preliminary recital in a release expressing an intention of the parties executing it, not to release a certain joint obligor, is not enough to overcome the proposition of law that an instrument which absolutely and unconditionally releases one joint obligor, will operate to release his other joint obligors, unless it appears “upon its face, and in connection with the surrounding circumstances, that it was the intention of the parties not to release the co-obligors;” and such will be its legal effect, though the parties are ignorant thereof when the release is executed.

2. **JOINT OBLIGORS—Release of One Discharges All.**—The reason why a release of one of several co-obligors discharges all, is that by such release the right of contribution is cut off. Where such right is reserved, the release will be construed as a covenant not to sue, leaving the liability of the co-obligors unimpaired.

Creditor's Bill.—Appeal from the Circuit Court of Cook County; the Hon. EDWARD F. DUNNE, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1898. Affirmed. Opinion filed July 11, 1899.

THOMPSON, CLARK & WILKINS, attorneys for appellant.
The technical rule by which a release of one joint debtor is made to operate as a discharge of all, is not to be extended to cases not within the reason and equity of the rule. *Moore v. Stanwood*, 98 Ill. 605; *Parmelee v. Lawrence*, 44 Ill. 405; *Lumberman's Ins. Co. v. Preble*, 50 Ill. 335.

While formerly a more strict and technical rule prevailed, the weight of authority now is, although apt and technical words of release are used, that if the parties, taking into consideration the circumstances of the case, their relation to each other, and considering the instrument as a whole, can not reasonably be supposed to have intended a release of the whole debt, it will be construed only as an agreement not to charge the party to whom the release is given,

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and will not be permitted to have the effect of a technical release. Benton v. Mullen, 61 N. H. 127; Bonney v. Bonney, 29 Ia. 448; McAllester v. Sprague, 34 Me. 296; Burke v. Noble, 48 Pa. St. 168; Couch v. Mills, 21 Wend. 424; Durrell v. Wendall, 8 N. H. 369; Thomason v. Clark, 31 Ill. App. 404; Murphy v. Halloran, 50 Ill. App. 594.

In equity a more liberal rule has always obtained, and a receipt or release of this nature has been given the effect intended by the parties and held merely as a covenant not to sue.

In equity the release of one of several joint obligors will not extend beyond the clear intention of the parties and the justice of the case. Norris v. Ham, R. M. Charlton (Ga.) 267; Claggett v. Salmon, 5 Gill & J. (Md.) 314.

The first construction in most cases disappoints the intention of the parties and carries the legal effect of the instruments beyond their meaning, for which reason the courts incline to adopt the construction which gives the instrument the effect of a covenant not to sue merely, and the intention of the parties is thus carried out. Russell v. Adderton, 64 N. C. 420.

At law a release of one party is a release of all, but the rule is otherwise in equity. Midgett v. Matson, 44 Mo. 308; Parmelee v. Lawrence, 44 Ill. 605; Claggett v. Salmon, 5 Gill & J. (Md.) 351; Norris v. Ham, R. M. Charlton (Ga.) 269.

A receipt given to one partner in satisfaction of all demands against him will not discharge his co-partners unless so intended. 1 Lindley on Partnership, 435, citing Ex parte Good, 5 Ch. D. 46.

PECK, MILLER & STARR, attorneys for appellee.

The instrument, if it releases one obligor, will operate to release the other joint obligor. Parmelee v. Lawrence, 44 Ill. 405; Leland v. Winslow, 128 Ill. 304; Benjamin v. McConnell, 4 Gilm. 536; Rice v. Webster, 18 Ill. 331; Struble v. Hake, 14 Ill. App. 546; Lovejoy v. Murray, 3 Wall. (U. S.) 1.

The instrument executed by complainant is a plain, absolute, unconditional and unambiguous release of a joint judgment debtor, and can not be impeached, varied or altered by evidence *aliunde*. *Miltimore v. Ferry*, 171 Ill. 225; *Ames v. Brooks*, 143 Mass. 344; *McClelland v. James*, 33 Ia. 571; *Glendale Co. v. Insurance Co.*, 21 Conn. 36.

MR. JUSTICE SHEPARD delivered the opinion of the court.

This appeal is from a decree of the Circuit Court of Cook County, in favor of the defendants (appellees) to a creditor's bill filed by the appellant upon a certain judgment by confession recovered by appellant against the appellee Dewitt C. Mallory, for \$2,225.25, and costs of suit.

Dewitt C. Mallory was, at one time, a member of a partnership, composed of himself and Lucy Ann Mallory, doing business under the name of H. E. Mallory & Bro., which partnership was dissolved December 1, 1888, and he then retired from the firm.

The note upon which said judgment was entered was given by the said Lucy Ann Mallory in the name of the old firm and individually, after the dissolution of the firm, in renewal of a remaining unpaid part of certain indebtedness accrued while Dewitt C. Mallory was her partner, and said judgment was against said Dewitt C. Mallory and Lucy Ann Mallory as co-partners as H. E. Mallory & Bro., and Lucy Ann Mallory individually.

The point that is made and argued concerning the validity of the confessed judgment, as to Dewitt C. Mallory, need not be considered by us. The decision below does not seem to have turned upon or have been influenced by that question, and in the view taken by us it may be considered for the purpose of this case that the judgment was a valid one when entered, as against the principal defendant here, Dewitt C. Mallory.

The main question, therefore, is whether appellant by his dealings and settlement with Lucy Ann Mallory, the co-defendant of Dewitt C. Mallory in the judgment, released the latter. The master in chancery, to whom the cause was

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referred, found from the evidence, and so reported to the Circuit Court, that by such dealings and settlement there had been a full settlement, payment and satisfaction of said judgment, and of the indebtedness out of which it arose; and the Circuit Court, by its decree, found *inter alia*, as follows:

“That the judgment mentioned in said bill of complaint herein and upon which the said amended bill of complaint is founded, has been fully paid and satisfied, and that the complainant herein has received full payment and satisfaction thereof; that the judgment note upon which the said judgment was entered has been duly canceled, and that there is nothing now due and owing to said complainant Frank H. Clark from the defendants herein, or either of them, upon said note or upon the judgment entered thereon;” and decreed accordingly.

To detail all the evidence which directly or indirectly bears upon the question of fact of such release, would greatly prolong this opinion, and would serve no valuable purpose in any other case. An attentive reading and consideration of all the evidence contained in the record has satisfactorily established to our minds that there is in it abundant support to the decree.

There is not room for doubt, nor is it disputed, that Lucy Ann Mallory was effectually released, and that it was so intended, from the judgment and the indebtedness upon which it was based. The contention, however, is that it was not intended by her or by the appellant, by anything that was done, to release Dewitt C. Mallory.

All the writings that were given in effectuation of the settlement entered into between appellant and Lucy Ann Mallory are in legal effect absolute releases of the said Lucy Ann from all obligation and liability upon said judgment and the note upon which it was confessed, and contain no reservation of claim against Dewitt C. Mallory or anybody else, on account thereof.

Appellant claims that a preliminary recital in a paper upon which the final receipts given by appellant to Lucy Ann Mallory were written, expresses an intention of the parties not to release Dewitt C. Mallory.

That recital is as follows:

"Said plaintiff (the appellant), having agreed upon a settlement of said judgments with said Lucy Ann Mallory, now Randolph, so far as her liability thereon is concerned, and by virtue of which settlement she is to be forever released from all liability thereon both as to damage and costs," etc.

It is not altogether certain what the attitude is of the appellant toward the paper containing the foregoing recital. Appellant testifies that he refused to sign it and that it was not acted upon. His counsel, however, make the above mentioned claim concerning it, and elsewhere in their brief say that the chief contention in the case is as to its proper construction.

It is certainly referred to in the final receipts given by appellant as the basis for the settlement made, and was in evidence. Considered, however, with reference to appellant's claim in the respect mentioned, it is manifest that a mere recital like that is not enough to overcome the proposition in law, that an instrument which absolutely and unconditionally releases one joint obligor, will operate to release his other joint obligors, unless it shall appear "upon its face, and in connection with the surrounding circumstances, that it was the intention of the parties not to release the co-obligors;" and such will be its legal effect though the parties are ignorant thereof when the release is executed. *Parmelee v. Lawrence*, 44 Ill. 405.

The reason why a release of one of several co-obligors discharges all, is that by such release the right of contribution is cut off. Where such right is reserved, the release will be construed as a covenant not to sue, leaving the liability of the co-obligors unimpaired. *Ibid.*

The evidence, according to appellant's brief, that tended to show the "surrounding circumstances," and that it was not intended to release Dewitt C. Mallory, consisted of the testimony of the appellant, certain letters to appellant from the attorney of Lucy Ann Mallory, bearing dates ranging from fifteen months to one month prior to the time when the settlement papers were agreed to and executed, and an affidavit of Lucy Ann Mallory which seems to have been

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read upon the hearing of a motion to vacate the decree, and perhaps some other circumstances. Those letters and that affidavit, if competent for any purpose, are not entitled to much weight upon the question before us. The testimony of appellant, though explicit and direct in contradiction of the effect of the papers signed by him, was held by the master and the chancellor to be insufficient to overcome the written documents, and their conclusion in such respect should not, under well settled rules, be held by us to be erroneous.

In consideration of the whole case, as made by the record, we are of the opinion that the Circuit Court decreed rightly, that the judgment has been satisfied, and no longer constitutes a basis for a creditor's bill.

There are some minor matters which have been argued, but the main question is the only one we regard as possessing sufficient merit to discuss, and upon that our conclusion is that the decree should be affirmed.

Mr. Justice HORTON did not participate in the decision.

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1. REPLEVIN—*When Plaintiff Fails to Prosecute his Suit.*—If the plaintiff in an action of replevin fails to prosecute his suit with effect, judgment is to be given for a return of the property and damages for the use thereof.

2. JUDGMENTS—*Sec. 3, of Chap. 7, R. S., Applicable to Appellate Court.*—Section 3 of Chap. 7, R. S., providing that no judgment shall be reversed in the Supreme Court for mere error in form, if the judgment be for the true amount of indebtedness or damages, is alike applicable to the Appellate Court.

3. SAME—*Substance Rather than Form.*—Substance rather than form is to be considered in determining whether a judgment is sufficient.

Replevin.—Trial in the Circuit Court of Cook County; the Hon. CHARLES E. FULLER, Judge, presiding. Verdict and judgment for defendant; appeal by plaintiff. Heard in this court at the October term, 1898. Affirmed. Opinion filed June 29, 1899.

MORAN, KRAUS & MAYER, attorneys for appellant.

ARND & ARND and LYNDEN EVANS, attorneys for appellee; LYNDEN EVANS, of counsel.

It is a well settled rule of the common law that neither irregularity nor informality will render a judgment void. Chestnut v. Marsh, 12 Ill. 17S; Wells v. Hogan, Br. (Ill.) 337; Johnson v. Gillett, 52 Ill. 360; Schertz v. Nat. Bank, 47 Ill. App. 139; Coats v. Barrett, 49 Ill. App. 275; Minkhart v. Hankler, 19 Ill. 47.

MR. JUSTICE ADAMS delivered the opinion of the court.

This was an action of replevin by appellant against appellee. May 5, 1898, the following judgment was entered in the cause:

"On motion of plaintiff's attorney it is ordered that this suit be and the same is hereby dismissed at plaintiff's cost.

Therefore it is considered by the court that the defendant do have and recover of and from the plaintiff his costs and charges in this behalf expended and have execution therefor.

It is ordered that a *retorno habendo* do issue herein for the return of the property replevied herein by virtue of writ of replevin issued in said cause.

Thereupon the plaintiff enters herein its motion to set aside the above order, which motion is hereby entered, and continued to Saturday, May 7, 1898."

May 7, 1898, the motion to set aside the order was overruled. December 15, 1898, after appellant had perfected his appeal by filing bond, the order of May 5, 1898, was amended. The amending order is as follows:

"This cause having come on to be heard on motion of defendant to amend the record of the order and judgment entered herein on the 5th day of May, 1898, and due notice of said motion having been given to the plaintiff, and the plaintiff and defendant appearing in court by their respective attorneys, and the court having heard counsel for both plaintiff and defendant, and being fully advised in the premises, the court finds that on the 5th day of May, 1898, judgment was rendered in this case, among other things, that the defendant have and recover of the plaintiff a return

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of the property taken under the writ of replevin issued in this cause, and that the clerk of this court has omitted to set forth such judgment in the record of said order and judgment of May 5, 1898; it is therefore ordered by the court that the record of said order and judgment of May 5, 1898, be and the same is hereby amended so as to read as follows:

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vs.
ANDREW D. BISHOP. } 91,208.

On motion of plaintiff's attorney, it is ordered that this suit be and the same is hereby dismissed, and on motion of defendant it is considered by the court that the defendant have and recover of and from the plaintiff a return of the property taken under the writ of replevin herein, and also his costs of suit in this behalf and have execution for said costs, and it is further ordered that the writ of *retorno habendo* do issue herein for the return of said property taken under said writ of replevin. Thereupon the plaintiff enters herein its motion to set aside the above order, which motion is hereby entered and continued to Saturday, May 7th, 1898.'

And the clerk of this court is hereby ordered and directed to forthwith spread this order of record in this cause.

To the entry of the above and foregoing findings and order, and every part thereof, the plaintiff objects and excepts, and prays an appeal to the Appellate Court of the First District of Illinois; which appeal is allowed, on plaintiff giving bond with surety, to be approved by the clerk of this court, in the sum of two hundred and fifty dollars (\$250); bond and bill of exceptions to be filed within thirty days."

The error assigned is :

"The court below erred in entering so much of the judgment entered in said cause on May 5, 1898, as ordered a return of the property replevied in said cause by virtue of the writ of replevin issued in said cause."

The record presents two questions: first, whether there is reversible error in the judgment entered May 5, 1898, and second, whether the amending order was proper.

The statute concerning replevin provides that if the plaintiff in an action of replevin fails to prosecute his suit with effect, "judgment shall be given for a return of the property and damages for the use thereof," etc., and strict

formality would require an express judgment that the property be returned to the defendant, prior to the order for the issuance of the writ of *retorno*, but we think the judgment appealed from, although not strictly formal, good in substance. The objection made here was made in McCrory v. Hamilton, 39 Ill. App. 490, which was debt on a replevin bond, and the court say:

"It is next urged that the judgment in the replevin suit is not sufficiently formal, and that it is not, in terms, a judgment that the property be returned to the defendant, as alleged in the declaration, but merely that the defendant have a writ of *retorno habendo*. The objection is, as we think, not substantial. While the judgment is somewhat informal, yet it is not so defective as to be regarded as a nullity. In effect it is an adjudication of costs against the plaintiff, and that the property be returned to the defendant."

Section 3 of Chapter 7 of the Rev. Stat. provides: "No judgment shall be reversed in the Supreme Court for mere error in form, if the judgment be for the true amount of indebtedness or damages." In Coats v. Barrett, 49 Ill. App. 270, it was held, correctly, as we think, that this section is applicable to the Appellate Court. Sec. 1, S. & C.'s Stat., Chap. 37, paragraph 30.

The statute in relation to ejectment requires that the verdict of the jury shall specify the estate established on the trial, when the verdict is for the plaintiff, and when an ejectment suit is tried by the court, without a jury, the finding, if for the plaintiff, must so specify.

In Minkhart v. Hankler, 19 Ill. 47, which was ejectment tried by the court, without a jury, the court found "the defendant guilty of unlawfully withholding from the plaintiffs the premises in the plaintiffs' declaration mentioned, to-wit: Lot number 17, etc., * * * and that the plaintiffs are entitled to the same." There was no specific finding, in terms, of the estate to which the plaintiffs were entitled, yet the court held the finding sufficient.

Substance, rather than form, is to be considered in determining whether a judgment is sufficient. Freeman on

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Judgments, Secs. 50–51; Wiggins v. City of Chicago, 68 Ill. 372; Mapes et al. v. Scott, 94 Ib. 379.

We think it clear that the omission of a formal judgment, in terms, from the judgment of May 5, 1898, was a mistake or misprision of the clerk, as found by the court in the amending order of December 15, 1898, and such being the case, the court could lawfully enter the amending order. Freeman on Judg., Sec. 72; 1 Black on Judg., Sec. 151; Ives v. Hulce, 17 Ill. App. 30; Coughran v. Gutcheus, 18 Ill. 390; Ayer v. Chicago, 149 Ib. 262, 266; Adams v. Gill, 158 Ib. 194; Tucker v. Hamilton, 108 Ib. 464.

The judgment will be affirmed.

**Benjamin F. Straus and Benjamin Rosenberg, Im-
pleaded, etc., v. Joseph Kohn.**

1. **PARTNERSHIP—Usual Characteristics of.**—The usual characteristics of an ordinary partnership, are a community of interest in profits and losses, a community of interest in the capital to be employed, and a community of power in the management of the business engaged in, but an agreement to share profits and losses may be said to be the type of a partnership contract.

2. **PARTNERS—Defined.**—Persons engaged in any trade, business or adventure, upon the terms of sharing the profits and losses arising therefrom, are partners in the trade or adventure.

3. **PRESUMPTIONS—As to Partners—May Be Disproved.**—Where parties agree to share in the profits of a business, the law will infer a partnership between them in the business to which the agreement refers; but this presumption may be overcome by proof to the contrary.

4. **SAME—Sharing of Profits and Losses.**—The sharing of the profits necessarily implies a sharing of losses, there being no agreement to the contrary.

Assumpsit, upon a verbal agreement. Trial in the Superior Court of Cook County; the Hon. JOHN BARTON PAYNE, Judge, presiding. Verdict and judgment for plaintiff; appeal by defendant. Heard in this court at the October term, 1898. Reversed and remanded. Opinion filed June 29, 1899.

MORAN, KRAUS & MAYER and SIMEON E. BAUM, attorneys for appellants.

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A mere agreement to form a partnership does not of itself create a partnership. The parties must enter on the execution of the agreement before the relation of partners exists between them. Doyle v. Bailey, 75 Ill. 418; Wilson v. Campbell, 5 Gil. 383.

MAX ROBINSON, attorney for appellee, contended that an agreement to share profits, nothing being said about losses, amounts, *prima facie*, to an agreement to share losses also, and constitutes, *prima facie*, a partnership. Illingworth v. Parker, 62 Ill. App. 653; Story on Part., Sec. 55, 60; Collyer on Part., Sec. 79.

Nothing, perhaps, can be said to be absolutely essential to the existence of a partnership except a community of interest in profits resulting from an agreement to share them. Illingworth v. Parker, 62 Ill. App. 653.

The existence of a partnership may be established by circumstantial evidence. Loucks v. Paden, 63 Ill. App. 545.

Statement.—Appellants Straus and Rosenberg, with one Leopold Oesterreicher, about February 13, 1891, made the following agreement:

“ This agreement made and entered into this 13th day of February, by and between L. Oesterreicher, B. F. Straus and Benjamin Rosenberg, witnesseth :

Whereas, said parties have entered into a contract with one William S. Yost to purchase for their joint account the following described property :

The north three (3) acres of the east half ($\frac{1}{2}$) of the northeast quarter (N. E. $\frac{1}{4}$) of the southwest quarter (S. W. $\frac{1}{4}$) of the southwest quarter (S. W. $\frac{1}{4}$), and the west half ($\frac{1}{2}$) of the northeast quarter (N. E. $\frac{1}{4}$) of the southwest quarter (S. W. $\frac{1}{4}$) in section thirty-five (35), township thirty-eight (38) north, range fourteen (14), east of the third principal meridian, in Cook county, Illinois; and for convenience' sake have taken said contract in the name of B. F. Straus, who now holds the same for the benefit of the parties hereto jointly, and who agree to subdivide said property of record into seventy-six lots and form a syndicate to be known as the Drexel Avenue Land Syndicate, for the immediate sale of said property in lots.

Now, therefore, this agreement witnesseth :

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Whereas, said Benjamin Rosenberg has advanced the sum of one thousand and no 100 dollars, to enable the parties hereto to obtain said contract, and said L. Oesterreicher and B. F. Straus have agreed and do hereby agree to dispose of and sell said seventy-six lots or syndicate shares, at a uniform price of four hundred dollars (\$400) per lot or share, upon terms to be agreed upon,

Said parties hereby agree with each other for the considerations hereinbefore mentioned, that whatever profits may accrue out of the sale of said property shall be divided among them equally, each to receive one-third thereof.

BENJAMIN ROSENBERG, [SEAL.]
BENJAMIN F. STRAUS, [SEAL.]
LEOPOLD OESTERREICHER. [SEAL.]

Appellee saw and read this agreement the latter part of February, 1891, before he rendered any of the services to recover for which this suit was brought, and says he saw in the agreement the provision that Rosenberg was to put in the money and the other two men were to sell the lots. Appellee made a verbal agreement with Oesterreicher, by which the latter agreed that if appellee would sell nineteen shares of the syndicate, he, Oesterreicher, would guarantee appellee at least \$1,000 from the syndicate. At the time the latter agreement was made, Oesterreicher told appellee that Straus and Oesterreicher were to dispose of the lots.

Appellee sold nineteen lots, including eight which he took himself, and made certain payments thereon to Rosenberg, with whom the contracts with the several purchasers were made.

Appellee brought suit, declaring on the common counts against Rosenberg, Straus and Oesterreicher. Straus and Rosenberg each filed separate pleas of the general issue, non-joint liability verified by affidavit, and the statute of limitations, on which issue was taken. Oesterreicher made no defense. A trial before the court and a jury resulted in a verdict for appellee of \$1,340, from which was remitted \$340, and judgment rendered for the balance, \$1,000, from which Rosenberg and Straus have appealed.

There was no evidence that either Rosenberg or Straus had anything to do with making the agreement between

Oesterreicher and appellee, nor any evidence from which it may be said that they authorized or ratified it, beyond statements made by Oesterreicher to appellee in the absence of Rosenberg and Straus.

At the close of plaintiff's evidence, and also at the close of all the evidence, Rosenberg and Straus asked separate instructions directing the jury to find the issues for defendants.

MR. JUSTICE WINDES delivered the opinion of the court.

The principal question presented is, were Rosenberg, Straus and Oesterreicher partners under the agreement set out in the statement in the sense that the contract of Oesterreicher alone and appellee was binding on Rosenberg and Straus without their authorization or ratification.

We are inclined to the opinion that the written agreement made Rosenberg, Straus and Oesterreicher partners, but in a limited sense, however.

In *Wilcox v. Dodge*, 12 Brad. 517-28, this court, in considering the requisites of a partnership, speaking by Mr. Justice McAllister, quotes from *Ewell's Lindley* on Part., 1, viz.:

"An agreement that something shall be attempted with a view to gain, and that the gain shall be shared by the parties to the agreement, is the grand characteristic of every partnership, and is the leading feature of nearly every definition of the term."

Again, on page 15, the same author says:

"Nothing, perhaps, can be said to be absolutely essential to the existence of a partnership, except a community of interest in profits resulting from an agreement to share them. But although this is so, the usual characteristics of an ordinary partnership, are a community of interest in profits and losses, a community of interest in the capital to be employed, and a community of power in the management of the business engaged in."

Again, on page 18, the same learned and accurate author says:

"But an agreement to share profits and losses may be

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said to be the type of a partnership contract. Whatever difference of opinion there may be as to other matters, it admits of no doubt whatever, that persons engaged in any trade, business or adventure, upon the terms of sharing the profits and losses arising therefrom, are partners in the trade, business or adventure."

This court held that an agreement to share the net profits necessarily implied a sharing of the losses.

In Morse v. Richmond, 6 Brad. 168, 171, a somewhat similar contract, for the purchase, subdivision and sale of a tract of land, was held by this court to constitute a partnership, especially because of community of interest in the enterprise, but of such a peculiar sort that in the absence of an express authority to borrow money and of evidence of usage, authority would not be implied in the managing partner to borrow money and give notes which would be binding upon the other partner without his privity or assent. This case was affirmed by the Supreme Court, 97 Ill. 303–10, the court holding that by all the tests laid down in the books there was every element of a partnership in the case. In Ulery v. Ginrich, 57 Ill. 532, the Supreme Court makes a distinction between an ordinary commercial partnership and one organized for mining or for farming purposes, and held that the directors or active agents of the latter will not, as incident to the business, "possess the power to draw or accept bills or to draw or indorse notes for the company. In such cases there must be some proof that an express authority is given for this purpose, or that it is implied by the usages of the business, or the ordinary exigencies and objects thereof."

In Lockwood v. Doane, 107 Ill. 235–9, it was held that "where parties agree to share in the profits of a business, the law will infer a partnership between them in the business to which the agreement refers; but this presumption may be disproved."

In the case at bar, the agreement states the parties to it have purchased by contract, for the joint account of Rosenberg, Straus and Oesterreicher, a piece of real estate, the title to be taken in the name of Straus, who was to hold

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the same for the benefit of all the parties jointly; the property was to be subdivided into lots for immediate sale; Rosenberg advanced \$1,000 to enable the parties to obtain said contract; that Oesterreicher and Straus have agreed and did thereby agree to dispose of and sell the lots, and that the parties have agreed with each other that whatever profits may accrue out of the sale of said property shall be divided among them equally, each to receive one-third thereof.

This agreement contains the "grand characteristic of every partnership," viz., the provisions with a view to gain, and a sharing of the gain by the parties, and also provides for a community of interest in the subject-matter of the partnership—the land. That makes it a *prima facie* partnership between the parties to the agreement, and there is no evidence to overcome the *prima facie* case. The sharing of the profits necessarily implies a sharing of losses, there being no agreement to the contrary.

Appellants seem to place special reliance on the case of *Morton v. Nelson*, 145 Ill. 590, as controlling the case at bar, and holding that the agreement in question did not make a partnership. An examination of that case shows that the agreement then under consideration by the court did not show a community of interest in the subject of the alleged partnership. Two of the parties did not pay any part of the purchase money of the land nor of the cost of the building erected on it, nor was there any agreement to that effect, nor does it appear in what way these parties became interested, nor whether they contributed anything toward the joint enterprise by way of labor, services or otherwise. In the case at bar, the clear inference from the agreement is, that the several parties were to contribute equally toward the purchase of the land. Rosenberg advanced \$1,000 to enable the parties to obtain the contract of purchase of the land. The purchase was on joint account and it must be presumed each was to contribute toward the purchase money. Oesterreicher and Straus agreed to sell the lots and therefore in that way acquired community of interest in the land, if they were not bound to contribute

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toward the purchase money agreed to be paid. The other cases cited by appellant on this point we think are clearly distinguishable from the case at bar.

Appellee had notice, however, of all the provisions of this agreement. He read it and knew that Rosenberg advanced the money to enable the parties to obtain the contract of purchase of the land, and that Straus and Oesterreicher had agreed to sell the lots. We therefore think that while there was a partnership, it was of a peculiar and special sort, of the terms of which appellee had notice.

The right of one partner to bind another in the ordinary commercial partnership is based upon the theory of agency. Here Straus and Oesterreicher were to sell the lots; that was their duty or obligation in the joint adventure, with which Rosenberg was not concerned. The partnership is similar to the farming partnership which was in question in the Ulery case, and the land partnership in the Morse case, *supra*, and we are of opinion that there being no express authority from Rosenberg shown, Oesterreicher had no power to employ appellee to sell lots so as to bind the partnership to such agreement, without the privity or assent of all the members of the firm—in any event, of Rosenberg. As we have seen, there was no proof of any usage in this respect, nor of exigencies or objects of the business, which could be the basis of implied authority, nor was there proof to show a ratification. There was error, therefore, in refusing appellants' instructions to find the issues for defendants.

It follows, if we are correct in holding there was a partnership of the nature indicated, of the terms of which appellee had notice, the court should have excluded evidence of conversations between appellee and Oesterreicher in the absence of Rosenberg and Straus.

We find no reversible error in the rulings of the court excluding evidence offered by appellants, of which complaint is made.

There was no evidence on which to base the clause, "and the losses" in appellee's first instruction, and that clause should have been eliminated from the instruction.

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It seems unnecessary to consider the other questions made by counsel as to the instructions, as error in that regard, if any there be, may be avoided on another trial.

The judgment is reversed and the cause remanded.

**Booksellers and Stationers' M. S. L. and B. Ass'n v.
Florence A. Swartwout.**

1. INSTRUCTIONS—*Where They Should be Accurate.*—Where the evidence is conflicting it is important that the instructions to the jury should be accurate.

Assumpsit, to recover the amount due upon withdrawal of ten shares of stock. Trial in the Circuit Court of Cook County; the Hon. RICHARD S. TUTHILL, Judge, presiding. Verdict and judgment for plaintiff; appeal by defendant. Heard in this court at the October term, 1898. Reversed and remanded. Opinion filed June 22, 1899.

Statement.—Appellee brought this suit against appellant in assumpsit to recover the amount due upon withdrawal of ten shares of stock of the appellant association. The only defense presented was that appellee had already received the amount due upon such withdrawal. Appellee made the investment in the shares of stock through one F. M. Sherman, who was secretary of the appellant association. Sherman, professing to act as authorized agent of appellee, withdrew the amount due upon these ten shares of stock on December 4th and 17th, 1894. The only controverted issues of fact were as to the authority of Sherman to act for appellee in thus withdrawing her interest in the association and receiving the moneys therefor, and as to a subsequent ratification by appellee of the acts of Sherman in this behalf. A letter was introduced in evidence, written by appellee to Sherman, upon which the authority to act for her is predicated. It appeared that appellee never surrendered to Sherman or to the association the certificate of the ten shares of stock. Upon the issues of fact

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presented, the jury found for the appellee, plaintiff below, and returned a verdict in her favor for the withdrawal value of the stock. From judgment upon such verdict this appeal is prosecuted.

MONK & ELLIOTT, attorneys for appellant.

EDWARD J. PHILLIPS, attorney for appellee.

MR. JUSTICE SEARS delivered the opinion of the court.

But two questions of fact were submitted to the determination of the jury in the trial in the Circuit Court, viz.: Did appellee authorize Sherman to act for her in withdrawing the value of the ten shares of stock, and if not, did appellee, after Sherman had withdrawn the shares and received the amounts due thereon, with knowledge of his acts, ratify them?

In disposing of this appeal we need to consider but one of the errors assigned, viz., the giving of one instruction. The instruction in question is as follows:

"If from a consideration of the evidence you believe that the plaintiff did not authorize Frank M. Sherman to withdraw said money, or if from such consideration of the evidence you believe that the plaintiff, with full knowledge of the fact that said Sherman had withdrawn said money from said association (if from the evidence you believe she had such knowledge), did not ratify his action in that respect by taking the personal note of said Sherman for the payment of said money so withdrawn from said association by him (if from the evidence you believe such an act was such ratification) or otherwise, then your verdict should be for the plaintiff."

This instruction is bad. In order to permit a recovery by appellee, it was necessary that the jury should find, not only that there was in fact no authority given to Sherman to act for her, but as well that she did not, with full knowledge of his acts, ratify them. The instruction in effect directs the jury that a recovery might be had if there was a lack of authority to act, irrespective of any subsequent ratification, and equally, that a recovery was per-

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mitted if there were no subsequent acts of ratification irrespective of an original authority to act. The instruction is also faulty, in that it submits to the jury a question as to whether the taking of the note would constitute a ratification.

The evidence is conflicting. We can not say, after a careful examination of it all, that it is so conclusive in favor of either litigant as to warrant a trial court in directing a verdict. Therefore it was proper that the issues of fact be submitted to a jury; and therefore, too, it was important that the instructions to the jury should be accurate. For the error in the giving of this instruction, the judgment is reversed and the cause is remanded.

B. H. Hellen v. Benjamin W. Anderson.

1. **MARRIAGE BROKERAGE—Defined.**—Marriage brokerage has been defined to be “the act by which a person interferes, for a consideration to be received by him, between a man and a woman, for the purpose of promoting a marriage between them.”

2. **SAME—Contracts Void.**—Contracts for procuring a marriage, in consideration of a money or other compensation, are void both at law and in equity, as being opposed to morality and public policy.

3. **CONTRACTS—For Procuring a Marriage Will Not be Enforced.**—The pernicious tendency of contracts for procuring a marriage is so great that enforcement of them by the courts will be refused regardless of the propriety or expediency of the particular marriage.

Assumpsit, on a marriage contract. Trial in the Superior Court of Cook County; the Hon. JOHN BARTON PAYNE, Judge, presiding. Finding and judgment for defendant; appeal by plaintiff. Heard in the Branch Appellate Court at the October term, 1898. Affirmed. Opinion filed July 11, 1899.

EDWARD DARROW, attorney for appellant.

SAMUEL W. JACKSON, attorney for appellee.

MR. JUSTICE SHEPARD delivered the opinion of the court. This appeal is from a judgment for costs against the

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appellant, rendered in a suit wherein the appellant was plaintiff, and the appellee was defendant. The suit was based upon the following contract in writing, entered into by the parties:

“Chicago, July 13, 1896. This agreement, entered into on the 13th day of July, A. D. 1896, at Chicago, in the State of Illinois, by and between B. H. Hellen, of Chicago, in the State of Illinois, party of the first part, and B. W. Anderson, of Chicago, in the State of Illinois, party of the second part; the said party of the first part agrees to introduce said second party to Mrs. Sarah Hughes, of the city of Chicago and State of Illinois; and the said second party agrees with said first party in case said second party marries said Sarah Hughes to pay said first party \$2,500.

Signed, sealed and delivered this 13th day of July, A. D. 1896.

B. H. HELLEN,
H. W. ANDERSON.”

August 4, 1896, defendant indorsed on said contract the following, viz.:

“So far Mr. B. H. Hellen has introduced the said B. W. Anderson to the said Sarah J. Hewes, and marriage yet remains to be consummated (consummated) to make the contract binding.

Dated August 4, 1896.

B. W. ANDERSON.”

September 22, 1896, plaintiff received from defendant \$5 to apply on said contract, which was indorsed thereon in defendant's presence by plaintiff, viz.:

“September 22, 1896. Cash \$5 to apply on within contract.

B. H. HELLEN.”

The case was tried by the court without a jury upon an agreed statement of facts, including the foregoing contract and the indorsements thereon, in which it is stated that on or about August 18, 1896, the defendant (appellee) and Sarah J. Hewes (the woman named as Sarah Hughes in the contract) were united in marriage at Chicago.

Among other agreed facts, it appears that the appellant brought suit against appellee in the Circuit Court of Cook

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County, to the December term, 1896, thereof, based upon the same contract, and that demurrers to the original and amended declarations, respectively, there filed, were sustained.

Upon the demurrer to the amended declaration being sustained, the plaintiff elected to stand by his amended declaration, and the suit was thereupon dismissed at plaintiff's costs, the judgment order reciting that the suit was dismissed for want of a declaration. An appeal to this court was prayed by plaintiff and allowed, but nothing was done to perfect such appeal.

Afterward the plaintiff paid to defendant the costs awarded him in said court, and then brought this action in the Superior Court.

To this suit in the Superior Court the defendant pleaded the general issue, and the said recovered judgment of the Circuit Court, and upon the hearing the Superior Court found the issues for the defendant and gave judgment against the plaintiff for costs, which is the judgment now here for review.

It is recited in the bill of exceptions that the finding of the issues in favor of the defendant was upon the ground that said judgment of the Circuit Court was final and was *res judicata* of the matters involved.

It is immaterial what the reason was for the judgment; if the judgment is right, upon the record that was made, it should stand, whether the Superior Court gave the right reason for it or not. No propositions of law were submitted to the trial judge and none were held or refused by him.

The record presents two questions: one, whether the judgment of the Circuit Court was *res judicata* as to the matters involved in this suit, or in other words, whether such matters were forever set at rest by that judgment; and the other, whether an action may be sustained upon a contract of marriage brokerage.

We have no doubt that the judgment of the Superior Court was right upon either and both questions, but we prefer to place our decision upon the latter and broader one

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Marriage brokerage has been defined to be, “the act by which a person interferes, for a consideration to be received by him, between a man and a woman, for the purpose of promoting a marriage between them.” Bouvier’s Law Dictionary (Ed. of 1897).

Such contracts for procuring a marriage, in consideration of a money or other compensation, are void both at law and in equity, as being opposed to morality and public policy.

The pernicious tendency of such contracts is so great that enforcement of them by the courts will be refused regardless of the propriety or expediency of the particular marriage. 2 Parsons on Contracts, star page 74; Boynton v. Hubbard, 7 Mass. star page 118; Greenhood on Public Policy, Rule 406, and cases cited.

“All agreements to pay for bringing about a marital alliance are void, whether the payment is to be made to one of the parties or to a third person (a professional marriage broker or any one) for effecting a marriage. All undertakings of such go-betweens as these mercenary match-makers are reprobated by law. And this is so whatever may be the stipulated reward for the undertaking.” Am. & Eng. Ency., Vol. 9 (1st Ed., “Illegal Contracts”), 919.

The contract in question is plainly one that is within the interdicted class, as may be seen by reference to numerous of the authorities.

No action is maintainable upon the contract, and the judgment of the Superior Court was right and is affirmed.

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Thomas McKeown v. Wladislav Dyniewicz.

1. **WARRANTIES—*Implied in the Construction of Mechanical Apparatus.***—A mechanic who undertakes to construct and furnish mechanical apparatus for a particular purpose, impliedly agrees that, when constructed, it will be reasonably sufficient for the purpose for which it is intended. The law implies in the case of all such contracts, in the absence of an express agreement or clear intention to the contrary, that the apparatus furnished shall be reasonably sufficient for the purpose.

2. **PRACTICE—*Motion to Strike Out Answers.***—A motion to strike out

the answers of a witness, when a part of it is clearly proper, must be directed specifically to the irresponsible and incompetent parts of the answer, and not generally against the whole.

3. SAME—*Motion to Expunge an Answer, When Too Late.*—A motion, even if proper in form, to strike out the improper parts of the answer of a witness, is too late if not made at the time the answer is given.

4. OBJECTION—*To be Made in Apt Time.*—Objections to questions to witnesses and their answers must be made in apt time, so that if sustained, the fault, if remediable, may be corrected during the progress of the trial.

5. INSTRUCTIONS—*Duty of the Parties to Prepare.*—A court is not bound to instruct the jury at all in the absence of instructions prepared and offered by the parties desiring them.

Assumpsit.—On contract to furnish heating apparatus. Trial in the Superior Court of Cook County; the Hon. JOSEPH E. GARY, Judge, presiding. Verdict and judgment for defendant; error by plaintiff. Heard in the Branch Appellate Court at the October term, 1898. Affirmed. Opinion filed July 11, 1899.

MITCHELL & ADDINGTON, attorneys for plaintiff in error.

CZARNECKI & KORALESKI, attorneys for defendant in error.

MR. JUSTICE SHEPARD delivered the opinion of the court.

This suit was brought by the plaintiff to recover from the defendant a claimed balance of \$222.75 for furnishing and putting up certain hot water heating apparatus under written propositions submitted therefor, which were orally accepted by the defendant, and for certain extra work, amounting in all to upward of \$800.

The plea was the general issue, and under it evidence was heard tending to show that the apparatus was defective in construction and would not perform what it was intended for, and that the defendant suffered damages in consequence. The jury returned a verdict finding the issues for the defendant, and a judgment for costs was rendered against the plaintiff.

The argument in behalf of plaintiff is directed to but three questions: That the verdict is against the weight of evidence, the erroneous admission of incompetent evidence,

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and error in the instruction given by the court upon its own motion.

The work undertaken was for the purpose of heating the defendant's store and printing shop.

A mechanic who undertakes to construct and furnish mechanical apparatus for a particular purpose, impliedly agrees that when constructed it will be reasonably sufficient for the purpose for which it is intended. The law implies in the case of all such contracts, in the absence of an express agreement or clear intention to the contrary, that the apparatus furnished shall be reasonably sufficient for the purpose. Springdale Cemetery Assoc. v. Smith, 32 Ill. 252.

A clear preponderance in the number of witnesses testified in behalf of defendant, and their testimony, if credible, shows that the apparatus that was furnished was defective and failed to accomplish what it was intended to perform.

The credibility of the witnesses and the weight to be given to their testimony were matters for the jury alone to determine.

From anything the record discloses to us the defendant's witnesses were as credible as the plaintiff himself, who was the only witness upon his side. Under the circumstances, we ought not to hold that the facts do not sustain the verdict.

The claimed errors concerning the admission of evidence consist of two matters.

Upon the direct examination of the defendant, he was asked, if, when he was compelled to shut down his presses (for lack of warmth from the heating apparatus), he sustained any damages. No objection to the question was made, but at the close of the witness' answer, the plaintiff moved to strike out the answer. The motion was properly overruled. A part of the answer was responsive to the question and was competent, although much of it was clearly not so. Had the motion prevailed, the result would have been to expunge from the record the responsive and competent part of the answer as well as the part that was

not so. The motion, to have been proper and effective, should have been directed specifically to the irresponsible and incompetent parts of the answer, and not have been directed against the whole answer, a part of which was clearly proper.

Later on, and after the testimony on both sides was closed, a motion, proper in form, was made to strike out the specifically bad parts of the answer of the witness, but it was then too late. The same may be said as to the contention that the court should have struck out the testimony of one Boyd, who testified in behalf of the defendant as to the amount paid by defendant to T. C. Boyd, a plumber and steam fitter, for repairing and altering the work done by plaintiff; that motion was also made after the testimony on both sides was closed. When the witness Boyd was on the stand, no objection was made to the questions put to him, nor to his answer, which it was not claimed until the end of the case, was incompetent.

The effect of much, if not all, of the testimony that was moved to be stricken out, might have been competently supplied at an earlier stage of the trial. The reasonable presumption is, that at the time the motions were made the witnesses were scattered; but whether so or not, the discretion of the trial judge in refusing to reopen the case, as would have almost necessarily followed the allowance of the motions, ought not to be interfered with.

Objections to questions to witnesses and their answers, must be made in apt time, so that if sustained, the fault, if remediable, may be corrected and remedied during the progress of the trial. No error, available to the plaintiff, was committed in the matter of the admission of evidence.

It is urged that the instruction given to the jury by the court upon its own motion (none being offered by either party) ignored two material contentions on the part of the plaintiff.

It is a sufficient answer to the contention to say that the court was not bound to instruct the jury at all in the absence of any instruction being prepared and offered by either

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party, but if any particular proposition of law not included in the given instruction, were desired by plaintiff to be incorporated into the instructions, he should have suggested the necessary addition. *Plaut v. Young*, 38 Ill. App. 102.

“It is not error for the court to omit to instruct on a particular point, where no instruction is asked on such point.” *Knickerbocker Ice Company v. DeHaas*, 37 Ill. App. 195.

There can be no well sustained objection to the instruction for what it does contain.

We discover no reversible error in the record, and the judgment will be affirmed.

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Northern Pacific Express Co. v. The Traders Insurance Co.

1. **APPELLATE COURT PRACTICE—Second Appeal—*Res Adjudicata*.**—Where the questions presented are identical with those adjudicated upon the former appeal, the law of the case then announced controls so far as the case on the second appeal is concerned.

Assumpsit, on a policy of insurance. Trial in the Circuit Court of Cook County; the Hon. **FRANK BAKER**, Judge, presiding. Finding and judgment for defendant; appeal by plaintiff. Heard in the Branch Appellate Court at the October term, 1898. Affirmed. Opinion filed July 11, 1899.

KEMPER K. KNAPP, attorney for plaintiff in error.

DUPEE, JUDAH, WILLARD & WOLF, attorneys for defendant in error.

MR. JUSTICE SHEPARD delivered the opinion of the court.

This cause, with the title reversed, was before the original court for this district once before, upon appeal, and the judgment of the Circuit Court in favor of the present plaintiff in error for its damages sustained, was reversed and the cause remanded. (70 Ill. App. 143.)

The cause was subsequently redocketed in the Circuit

Court and the demurrer of defendant in error to the declaration was sustained, in conformity with the opinion above referred to, and the plaintiff in error electing to stand by its declaration, judgment was entered for the defendant in error and against the plaintiff in error for costs.

The questions now presented are identical with those adjudicated upon the former appeal, and the law of the case then announced controls us, so far as the case now here is concerned.

Nothing remains for us but to affirm the judgment, and it is so done. Affirmed.

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Jennie E. Christie v. Bridget Burns.

1. **DECREES—Are Binding Only upon the Parties.**—The interest of persons who are not parties to a suit, and with no decree entered against them, are not affected by the decree and by the order appointing the receiver.

2. **RECEIVERS—Powerless as to Persons Not Parties or Privies.**—A receiver is powerless as against parties not within the jurisdiction of the court appointing him, and not claiming under rights *pendente lite* from parties over whom jurisdiction has been properly acquired.

3. **DEFICIENCY DECREES—When a Receiver will be Appointed Under.**—Where there is a deficiency decree, unless it appears that injustice will thereby be caused, or some reason exists justifying expectation that the deficiency can be otherwise satisfied, the court may appoint a receiver to enforce its judgment and decree, where the mortgaged premises is insufficient security and the person liable of very questionable responsibility. And this power exists where there are no express words in the mortgage giving a lien upon rents and profits.

Appeal from an Order Appointing a Receiver, entered by the Circuit Court of Cook County; the Hon. JOHN GIBBONS, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1898. Reversed in part, affirmed in part and remanded. Opinion filed July 11, 1899.

W. C. SHIPNES, attorney for appellant.

ALBERT G. WELCH and KENNER S. BOREMAN, attorneys for appellee.

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MR. PRESIDING JUSTICE FREEMAN delivered the opinion of the court.

This is an appeal from an order appointing a receiver in a foreclosure proceeding after sale of the property and a deficiency decree. The order directs the receiver to lease the premises, collect the rents, and out of the income "to pay all taxes, assessments and public charges duly and regularly levied" upon the premises described in the trust deed and sold to the complainant in the original bill under the decree of sale.

The bill was filed June 9, 1898, and service of summons was had upon appellant the 16th of the same month. Upon the hearing of the application for a receiver, appellant introduced in evidence a deed purporting to have been executed by her, dated and acknowledged June 2, 1898, but not filed for record until November 11th following, conveying to her brother, A. Ralph Johnstone, an undivided seven-eighths of the premises in controversy; also a deed conveying the remaining one-eighth to her brother, Balfour Johnstone, dated and acknowledged June 2, 1898, but not recorded. Neither of the Johnstones have been made parties to the foreclosure proceeding.

It is contended for appellant that the order appointing a receiver is erroneous, because it is said, it summarily takes away from the Johnstones the possession and enjoyment of the equity of redemption, they not being parties to the suit, not having been heard in opposition to the motion, and not being bound in any way by the foreclosure or decree.

It is sufficient to say that if erroneous, it is not so for the reason stated. Not being parties to the suit, and with no decree entered against them, their interest in the premises remains unaffected by the decree and unaffected by the order appointing the receiver. *McIntire v. Yates*, 104 Ill. 491, 503.

As was said in the case cited, they "may at any time * * * so far as the decree in this case is concerned, institute proceedings to establish their title if they have any."

In *Richardson v. Hadsall*, 106 Ill. 476, it was held that a writ of possession could only issue against the defendants in the bill to foreclose, and those claiming under them after the suit was commenced. The same is true as to any equivalent order or decree, including an order appointing a receiver. Such receiver is powerless as against parties not within the jurisdiction of the court appointing him, and not claiming under rights acquired *pendente lite* from parties over whom jurisdiction has been properly acquired.

If it is true, as claimed by appellee, that the Johnstones did in fact acquire title from appellant *pendente lite*, then they are as conclusively bound by the decree as if they had been parties to the foreclosure proceeding from the outset. *Norris v. Ile*, 152 Ill. 190, 199.

But as against any one "not a party to the proceeding in which it (the decree) was rendered, and who does not claim under it but on the contrary adversely to it, we are unable to perceive on what principle it establishes anything as to him, outside of the mere fact that such a decree was rendered. It is true, any one claiming title under it might, in an action of ejectment against one claiming adversely to it, offer it in evidence as a link in his own chain of title. Subject to these limitations, we do not understand the decree is of any binding force upon any one who was neither party nor privy to it." *Scates v. King*, 110 Ill. 456-464.

It is also said in that case, that this rule is not affected by failure of the claimant to put his deeds upon record before the commencement of the suit, because it appeared that before and during the pendency of that suit, he was in actual and exclusive possession, which was notice to the same extent.

In *Republic Life Ins. Co. v. Swigert*, 135 Ill. 150, 173, it is said :

"A receiver is the right hand and creature of the court of equity, and he has such powers as are conferred upon him, by the order appointing him and the course and practice of the court. It will hardly be claimed, however, that the court of chancery, even with all its inherent powers, is authorized, in the absence of legislative sanction, to

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clothe its receivers with power to seize and enforce a property right which belongs only to parties who are not before the court nor asking its assistance."

It is doubtless equally true that such right can not be enforced by a receiver against parties not before the court.

It is urged, however, in behalf of appellee, that the Johnstones acquired whatever title they have *pendente lite*. It seems to be supposed by counsel upon both sides of this controversy that this court will determine the question whether, from the showing made in affidavits filed and considered by the chancellor upon the hearing of the petition for appointment of the receiver, the Johnstones did or did not acquire title *pendente lite*. But neither the trial court nor this court has authority to thus summarily determine the rights of parties claiming under deeds alleged to have been executed and delivered before the proceedings before us were instituted, and who claim to have been in possession of the premises ever since, when such parties have not been subjected to the jurisdiction of the court and can not be heard in their own behalf.

But it is said by appellant that it is plain the appointment of the receiver deprived the Johnstones of the possession of their property. This, as we have said, by no means follows, and they are not here complaining. If the Johnstones are in possession rightfully, then the receiver acts at his peril if he interferes. The order appointing him gives him no authority as against the rights of parties over whom the court has not acquired jurisdiction, and can not deprive the Johnstones of a rightful possession, if such they hold. Appellee may or the receiver can, if they choose, readily bring the Johnstones into court, and the question whether their alleged rights were acquired *pendente lite*, or whether they acquired any rights whatever under the deeds referred to, can be properly determined. On the other hand, if the receiver has interfered with their alleged possession wrongfully, the Johnstones can readily protect themselves, even summarily, if their confidence in the strength of their title warrants.

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It is urged that the appointment of the receiver was erroneous, because not authorized in the trust deed nor justified by the showing made.

There was a deficiency decree, upon which an execution had issued, and which remained unpaid. Under these circumstances, unless it appears that injustice will thereby be caused, or some reason exists justifying expectation that the deficiency decree can be otherwise satisfied, the court may appoint a receiver for the same purpose that it issues an execution, namely, to enforce its judgment and decree where the mortgaged premises, being insufficient security, the person liable is of very questionable responsibility. And this power exists even where there are no express words in the mortgage giving a lien upon rents and profits. First Nat. Bank v. Illinois Steel Co., 174 Ill. 140, 149, and case there cited.

We think the appointment was justified by the language of the trust deed, and by the showing made upon the hearing of the application.

The order appointing the receiver directs the latter "to pay all taxes, assessments and public charges duly and regularly levied" out of the rents and income. This is erroneous. The grantor in the deed of trust or the owner of the equity of redemption, is entitled to receive the benefit of rents, issues and profits. Appellant is not in this case chargeable with payment of taxes for the purchaser at the foreclosure sale, except in case of redemption as provided by statute. Davis v. Dale, 150 Ill. 239.

For this reason the cause will be remanded to the Circuit Court, with directions to set aside so much of the order appointing the receiver as directs the payment of taxes, assessments and public charges. The remainder of the order is affirmed. Affirmed in part and reversed in part.

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Simon L. Elzas v. Ada Elzas.

1. **BILLS OF REVIEW—On Newly-Discovered Evidence.**—To entitle a litigant to a bill of review on the ground of newly-discovered evidence, it must generally relate to a matter in issue on the trial; not to make a new case, but to establish the old one: not be cumulative merely, nor simply to impeach former testimony in the case.

2. **SAME—A Matter of Discretion.**—The granting of leave to file a bill of review is not a matter of right, but one of sound discretion in the court, to be exercised cautiously and sparingly.

Order Denying Leave to File a Bill of Review.—Appeal from the Circuit Court of Cook County; the Hon. EDMUND W. BURKE, Judge, presiding. Heard in this court at the October term, 1898. Affirmed. Opinion filed June 22, 1899.

Statement.—Appellee was divorced from appellant January 22, 1897, being awarded by the decree the custody of her child, and alimony and solicitor's fees, which was on appeal affirmed by this court (72 Ill. App. 94), and also by the Supreme Court (171 Ill. 632). Before perfecting his appeal, appellant filed a petition in the Circuit Court, praying leave to file a bill of review to have said decree reviewed, reversed and set aside, and in support thereof also filed certain affidavits. No further step was taken until the decision of the Supreme Court had been rendered, when appellant filed a supplemental petition February 21, 1898, setting forth his appeals to this and also to the Supreme Court, and alleging that appellee "was financially irresponsible." The original petition sets forth in detail certain matters with reference to which it is alleged that appellee on the trial of her suit for divorce before the Circuit Court testified falsely, viz.: first, as to the giving by appellant to appellee of his photograph soon after their marriage; second, as to the date of birth and name of their child; third, as to her being a chaste, faithful and dutiful wife, or in other words, had not been guilty of adultery; fourth, as to appellant's introducing appellee as his wife to Joseph F. Ullman; fifth, as to their marriage being a common law marriage. Also, that

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appellant was surprised by the evidence of appellee to the effect that there had been a common law marriage between him and her, whereas he had expected she would attempt to prove that the marriage was solemnized by a minister, and he relied wholly on the defense that no marriage had in fact taken place. After the filing of the supplemental petition there were also filed further affidavits in support of the petition and affidavits in opposition thereto. The chancellor also, of his own motion, called as a witness R. A. Wade, who was appellant's solicitor on the trial of the divorce suit in the Circuit Court, and took his testimony. After a consideration of the petition, affidavits in support thereof, testimony taken in open court, and affidavits in opposition thereto, the chancellor denied the petition, and appeal is taken from the order in that respect made April 19, 1898. It appears from the record that an order was entered February 21, 1898, allowing appellant leave to file a bill of review on depositing with the clerk of the court all moneys due under the decree, but this order—for what reason does not appear—was set aside and vacated February 28, 1898. The hearing was had on April 19, 1898, which resulted in the order denying the petition, and from which the appeal is prosecuted.

B. M. SHAFFNER, attorney for appellant.

A bill of review may be founded upon newly-discovered facts, and when thus founded it may be brought as well after as before the affirmance of the original decree. Slason v. Cannon et al., 19 Vt. 219; Campbell v. Price et al., 3 Munf. (Va.) 227; 3 Daniel's Ch. Pr. 1733; Story's Eq. Pl., Sec. 418; Cooper's Eq. Pl., Sec. 91.

JOSEPH WRIGHT, attorney for appellee.

The rule of law is well settled, that in order to file a bill of review on the grounds of newly-discovered evidence, it must be of an important and decisive character, and refer to the matters in issue in the old suit; and not evidence that is merely cumulative, nor evidence that tends simply

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to impeach testimony given in the former case. Griggs v. Gear, 3 Gil. 2; Garrett v. Moss, 22 Ill. 363; Turner v. Berry, 3 Gil. 541; Judson v. Stevens, 75 Ill. 255; Boyden v. Reed, 55 Ill. 459.

MR. PRESIDING JUSTICE WINDES delivered the opinion of the court.

We are of opinion the chancellor did not err in denying appellant's petition.

To entitle a litigant to a bill of review on the ground of newly-discovered evidence, it must generally relate to a matter in issue on the trial, not to make a new case, but to establish the old one; it must not be cumulative merely, nor simply to impeach former testimony in the case. Story's Eq. Pl., Sec. 413; 2 Barbour's Ch. Pr. 92; Dexter v. Arnold, 5 Mason (C. C. U. S.), 303–13; Boyden v. Reed, 55 Ill. 458; Walker v. Douglass, 89 Ill. 425; Aholz v. Durfee, 122 Ill. 286.

As to whether the newly-discovered evidence must relate to a matter in issue on the trial, we are aware there is a conflict of authority (see Story's Eq. Pl., Sec. 416 and 2 Dan. Ch. Pr. 1572), but we will follow the rule as stated by the Supreme Court in the Boyden case, *supra*, to the effect that it must not be to make a new case, but to establish the old one. All the alleged newly-discovered evidence relating to the first, second, fourth and fifth points made by appellant's petition is merely cumulative in its nature, and by way of impeachment of appellee's testimony given on the trial. It is unnecessary to set it out in detail. It is not conclusive in its nature, and would not necessarily nor probably have produced a different result had it been before the chancellor, and especially is this true with reference to the photograph and date of the birth and name of the child, which were of slight importance.

As to the third point, we are of opinion that whether or not appellee had been guilty of adultery was not in issue on the trial; and even if appellant had offered evidence to show it, it could not have been properly received under the pleadings. There is no allegation in the bill that appellee

had been a chaste, faithful and dutiful wife, as claimed by appellant, and the nearest approach to such an allegation is that she "faithfully performed all her duties and obligations as a wife." The answer makes no charge of adultery against appellant, but states "that he denies each and every allegation in said bill contained," and then proceeds to deny the marriage, that a child was born to him and appellee, and that he was the owner of a large amount of property and was in receipt of a salary of \$10,000 per year. This being the state of the pleadings, proof of appellee's adultery would not have been admissible. *Home Ins., etc., Co., v. Myer*, 93 Ill. 271-4; *Johnson v. Johnson*, 114 Ill. 611-22.

In the former case the court say:

"It is a familiar rule of equity pleading, that a defendant is bound to apprise the plaintiff, by his answer, of the nature of the case he intends to set up (and that, too, in a clear, unambiguous manner); and that a defendant can not avail himself of any matter in defense which is not stated in his answer, even though it should appear in his evidence."

This rule is especially applicable to divorce cases and where the defense is recriminatory. 2 Bishop on Mar. & Div., Secs. 619 and 636, and cases cited.

The adultery of appellee not being an issue before the trial court, the alleged newly-discovered evidence set out in the petition would not be a proper matter for consideration on a bill for review. As to the claim that appellant was surprised by the evidence of appellee to the effect there was a common law marriage, and that he relied wholly on his defense that there had never been a marriage, it is sufficient to say that appellant's surprise was not made known to the chancellor, and no continuance was asked in order to meet that proof. Moreover, it appears from the testimony of Wade and the counter affidavits, that appellant's solicitor was aware some time prior to the trial, and even before the bill was filed, that appellee would probably make proof of a common law marriage. But it is claimed that the chancellor should not have considered the counter affidavits nor the testimony of Wade. We can not assent to this conten-

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tion. They were at least competent to be considered as to whether the evidence claimed to be newly discovered was in fact new, and also to explain the alleged new evidence. *Dexter v. Arnold*, 5 Mason, 303; 2 Barbour's Ch. Pr. 95; *Society of Shakers v. Watson*, 77 Fed. Rep. 512–16; *Long v. Granberry*, 2 Tenn. Ch. 85–96.

We have, however, carefully considered all the affidavits for and against the petition and the testimony of Wade, taken in open court, and can not say that the chancellor should not, on the evidence, have denied the petition, considering it only with reference as to whether it was newly discovered, whether appellant might not have discovered it in time for the trial had he exercised reasonable diligence, and as to its nature, whether cumulative simply or decisive and conclusive in character. The granting of such a petition is not a matter of right in the party, but of sound discretion to the court to be exercised cautiously and sparingly." *Craig v. Smith*, 100 U. S. 226; *Watson case, supra*.

Our Supreme Court, in *Schaefer v. Wunderle*, 154 Ill. 581, say :

"Leave to file a bill of review for 'newly-discovered evidence' is not granted as matter of right, but depends upon the sound discretion of the court to which the application is made. * * * Unless there has been an abuse of the fair discretionary power with which the Circuit Court has been invested in the matter of such applications, its decision should not be disturbed." See also *Stockley v. Stockley*, 93 Mich. 308.

The order denying the prayer of the petition for leave to file a bill of review is affirmed.

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1. PRACTICE—*In Divorce Proceedings After an Appeal*.—Where, at the next subsequent term and after an appeal, from an order denying leave to file a bill of review, had been perfected by a defendant in a proceeding for divorce, the court entered an order requiring him to pay

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forthwith to appellee \$200 for her solicitor's fees upon the appeal. *Held*, as the amount allowed was not an unreasonable one, there was no cause for disturbing the order.

2. STATUTES—*Construction of Sec. 15, Chap. 40, R. S.*—Sec. 15, Chap. 40, R. S., providing that in every suit for divorce the wife, when it is just or equitable, shall be entitled to alimony pending such suit, and in case of appeal or writ of error by the husband, the court may grant and enforce the payment of such sums of money for her defense, during the pendency of the appeal or writ of error as the court may deem equitable and proper, applies to and includes an appeal by the husband from an order to pay the wife \$200 for her solicitor's fees, in an appeal from an order refusing leave to file a bill of review.

3. DIVORCE—*Solicitor's Fees After Refusing Leave to File a Bill of Review.*—After a decree for divorce had been entered the husband and defendant was refused leave to file a bill of review to reverse it and took an appeal from the order denying such leave. *Held*, that this appeal did not prevent the court from entering an order in the divorce suit requiring him to pay to the wife a reasonable sum of money for her solicitor's fees upon the appeal.

Appeal from an Order for Solicitor's Fees.—Entered by the Circuit Court of Cook County; the Hon. EDMUND W. BURKE, Judge, presiding. Heard in this court at the October term, 1898. Affirmed. Opinion filed June 22, 1899.

Statement.—Appellee obtained a decree of divorce in her suit against appellant. Appellant presented his petition for leave to file a bill of review to reverse that decree. Upon hearing of the petition the court ordered it dismissed and denied the leave prayed.

An appeal was prayed from the order thus denying leave to file a bill of review, and the appeal was perfected by filing certificate of evidence and appeal bond on May 19, 1898.

At the June term, 1898, the court entered an order that appellant pay forthwith to appellee \$200 for her solicitor's fees upon the appeal last mentioned. From this order the appeal here is prosecuted.

B. M. SHAFFNER, attorney for appellant.

JOSEPH WRIGHT, attorney for appellee.

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MR. JUSTICE SEARS delivered the opinion of the court.

It is objected by counsel for appellant that after the appeal had been perfected the Circuit Court had no further power to enter the order here in question. This contention is disposed of by the decision in Jenkins v. Jenkins, 91 Ill. 167. It does not appear that the amount allowed was an unreasonable one, and there is no cause for disturbing the order upon that ground. Jenkins v. Jenkins, *supra*; Foss v. Foss, 100 Ill. 576; 2 Bishop on Marriage, Divorce and Separation, Sec. 988.

The other question presented, and the only one which is at all doubtful, is as to whether the statute which permits the entering of such orders for payment of solicitor's fees, after appeal in divorce proceedings, is sufficiently broad to include this proceeding, which is upon a petition for leave to file a bill to review and reverse a decree of divorce.

The question is not without difficulty. Whether a bill of review is to be considered as a part of and a continuation of the original suit in which the decree sought to be reviewed was entered, or as an original suit, is one upon which the authorities are not altogether clear. Some authors class a bill of review as an original suit in contradistinction to bills of revivor and supplemental bills. 2 Daniel's Ch. Pl. & Pr. (5th Am. Ed.), 1576, note 3.

Or as being "in the nature of" an original bill; and hold that it is not to be regarded as a continuation of the original suit. Story's Eq. Pl. (9th Ed.), 388; Mitford & Tyler's Pl. & Pr. in Eq. 129, 178.

The only decision of any court which seems to have so held is Cole v. Miller, 32 Miss. 39.

There are, however, authorities which treat the bill of review as being not an original suit, but as a proceeding supplementary to the suit in which the decree sought to be reviewed was entered. Cooper on Eq. Pl. (Tyler's Ed.), 43; Barrow v. Hunter, 99 U. S. 80.

In the former, the author, under the head of "bills not original, which relate to some matter already litigated in the court by the same persons, and which are either an

addition to, or a continuation of, an original suit," includes "bills of review to examine and reverse a decree made upon a former bill."

In the decision in the Barrow case, the Supreme Court of the United States, speaking of an action brought under the Louisiana Code to procure nullity of a former decree, said:

"The question presented with regard to the jurisdiction of the Circuit Court is whether the proceeding to procure nullity of the former judgment, in such a case as the present, is or is not, in its nature, a separate suit, or whether it is a supplementary proceeding, so connected with the original suit as to form an incident to it, and substantially a continuation of it. If the proceeding is merely tantamount to the common law practice of moving to set aside a judgment for irregularity, or to a writ of error, or to a bill of review or an appeal, it would belong to the latter category, and the United States court could not properly entertain jurisdiction of the case. * * * It would seem apparent that the proceeding in the present case was one that affected the mere regularity of the original judgment. In the common law practice, it would have been a motion to set aside the judgment for irregularity on a writ of error *coram nobis*."

There are incidents to the bill of review which give it the character of an original proceeding, such as the necessity of new process and service upon the parties defendant; and there are also incidents which would more properly belong to a supplementary proceeding, such as the requirement (with some exceptions) of leave of the court which entered the original decree to file the bill; the limitation of right to file it to those who were parties to the original suit, or their privies; the necessity of bringing in as parties all parties to the original suit; the possibility of accomplishing through it a rehearing of the original cause, etc. Daniel's Ch. Pl. & Pr. 1576, note 3; Story's Eq. Pl., Sec. 409; Cooper on Eq. Pl., 89, *et seq.*; Gilbert's Forum Romanum (Tyler's Ed.), 182.

While in some respects it may be, and has been regarded, technically considered, as in the nature of an original proceeding, and in other respects as in the nature of a supple-

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mentary proceeding, we have to inquire in this case whether it is to be held as so far ancillary to the original suit, *i.e.*, the divorce suit, as to be included within the spirit and the terms of the statute. The provision of the statute is as follows:

“In all cases of divorce the court may require the husband to pay to the wife, or pay into court for her use during the pendency of the suit, such sum or sums of money as may enable her to maintain or defend the suit; and in every suit for a divorce, the wife, when it is just and equitable, shall be entitled to alimony during the pendency of the suit. And in case of appeal or writ of error by the husband, the court in which the decree or order is rendered may grant and enforce the payment of such money for her defense, and such equitable alimony during the pendency of the appeal or writ of error as to such court shall seem reasonable and proper.”

We are disposed to hold that this proceeding, which is an effort to review and reverse a decree of divorce, is within the spirit and intent of the statute. It can scarcely be doubted that the intent of the general assembly was to provide by this statute for the necessities of the wife during any suit for the determination of the marriage relationship and to empower the court to compel the husband to furnish to the wife such sums as might be necessary to enable her to protect her rights in any such litigation. It would be inconsistent to suppose that it was intended to thus protect her interests and rights on the original trial and to leave her helpless to protect them when attacked by a bill presented to the same court, the purpose of which was solely to reverse the decree of divorce rendered in the original suit. The language of the statute is broad; it being “in all cases of divorce” that the provision is made to apply. We hold, therefore, that this proceeding is “a case of divorce,” within the spirit and terms of the statute, and that upon the appeal in such proceeding the court had power to enter the order for payment of solicitor’s fees.

The order is affirmed.

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1. CORPORATIONS—*Can Not Avoid Liability by Letting a Contract for Construction.*—A corporation can not avoid liability for its acts under its corporate franchises by simply letting a contract to a construction company, and where the person who causes the injury is a contractor he will be regarded as the servant or agent of the corporation for whom he is doing the work, if he is exercising some chartered privilege or power of such corporation with its assent which he could not have exercised independently of the charter.

2. SAME—*Must Take the Responsibility of Seeing that No Wrong is Done Through Its Chartered Powers.*—A company seeking and accepting a special charter must take the responsibility of seeing that no wrong is done through its chartered powers by persons to whom it has permitted their exercise.

3. NEGLIGENCE—*Efficient and Concurring Causes.*—Where the negligence charged was the cause, and an efficient cause, of the injury, and if some other act, as the starting of a car before the plaintiff had sufficient time to get aboard, was also a concurring cause, such concurring cause does not operate to free the company from liability for negligence.

4. SAME—*Efficient and Concurring Causes Distinguished.*—Where the act of a gripman, in improperly starting a car before the plaintiff had got aboard, is a concurring cause in producing an injury, yet the negligence of the company in having piles of stones placed dangerously near its track is also a cause, and an efficient cause, of the injury, the company will be liable.

5. INSTRUCTIONS—*Singling Out a Particular Witness.*—An instruction which tells the jury that “while the law permits the plaintiff in the case to testify in his own behalf, nevertheless they have the right, in weighing his evidence, to determine how much credence is to be given to it, and to take into consideration that he is the plaintiff and interested in the result of the suit,” is obnoxious, as singling out a particular witness.

6. DAMAGES—\$12,000 Not Excessive.—Where the conductor of a street car was injured, and as a result of his injuries was permanently crippled and rendered almost helpless, and unable to dress unaided or feed himself, with a stiffening and immobility of one arm, and a false joint, from a compound fracture, which had never united, leaving him only a slight use or motion of the arm, less than one-tenth of the normal, it was held that \$12,000 as damages are not unreasonable.

Action in Case, for personal injuries. Trial in the Superior Court of Cook County; the Hon. JOSEPH E. GARY, Judge, presiding. Verdict and judgment for plaintiff; appeal by defendant. Heard in this court at the October term, 1893. Affirmed. Opinion filed June 29, 1899.

North Chicago St. R. R. Co. v. Dudgeon.

Statement.—This cause was begun by appellee to recover damages for personal injuries, alleged to have resulted from negligence of appellant. The fourth count of the declaration sets up the following facts: That the defendant, at the time of the accident, was engaged in the repairing and relaying of certain rails, tracks and road-bed by it used, and was using in such repairing and relaying large quantities of stones, granite blocks, etc., and had placed the same along the streets, near the tracks upon which it operated its cars; that the plaintiff was in the employ of the defendant as a conductor upon its cars, and that the defendant at the time of the accident carelessly and negligently placed large piles of stones, granite blocks, etc., in the street, at, near and alongside the west railroad track of the defendant, and failed to guard and protect the same, and failed to place any light or warning signal near it; and that the plaintiff after sunset on the day of the accident, while acting as conductor and while with due care attempting to board a certain car of the defendant standing at the place where the accident occurred, was thrown by a sudden jerking or starting of the car against the pile of stones and other material, and was thereby forced against and underneath the car, whereby, etc.

The third count is in substance the same.

The evidence shows that appellee, who was then a conductor of one of the cars of appellant, and together with another conductor and a gripman, was going north on North Clark street, in the city of Chicago, on the east track of the defendant, was met at Ogden Front by a crew of appellant's employes in charge of a train which they had brought out for the crew on the north-bound train to take charge of and run down town. This was done because the train of which the plaintiff was one of the conductors was behind time, and to regain the time lost they were transferred to the other train without completing their trip. At the point where the transfer was made, O'Day and Farwell, contractors, were repairing the tracks of the defendant, and in the conduct of their work had piled stones west of and near the

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tracks in the street. While the transfer was being made, and before appellee had succeeded in getting aboard of his car, the train started up. By reason of the starting of the train, and by reason of the pile of stones adjacent to the track, the appellee was thrown upon the pile of stones and from them rolled under the train and was very seriously injured.

The work of repairing the tracks was done by O'Day and Farwell under some kind of oral contract with appellant. The cause has been tried twice. Upon the first trial the jury rendered a verdict in favor of the plaintiff and assessed his damages at \$10,000, and judgment having been entered on the verdict, appellant prosecuted its appeal to this court, where the judgment of the trial court was reversed. N. C. St. R. R. Co. v. Dudgeon, 69 Ill. App. 57.

Upon the second trial a verdict for the appellee was again returned and his damages were assessed at \$12,000, and judgment having been entered upon this verdict, the appellant brings the record to this court upon appeal.

EGBERT JAMIESON and JOHN A. ROSE, attorneys for appellant.

E. S. CUMMINGS, attorney for appellee.

MR. PRESIDING JUSTICE SEARS delivered the opinion of the court.

The right of appellee to recover upon the facts disclosed would seem to be limited to the ground of action set up by the third or fourth counts of the declaration; for the relation of fellow-servant existing between appellee and the gripman and other conductor of the train would preclude a recovery upon the other counts. The gist of each of the third and fourth counts is negligence in placing piles of stones along the side of the track upon which appellee was required by his service to change from one to another of the trains of appellant.

We have to determine whether the evidence sufficiently

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sustains the verdict of the jury to the effect that appellant was guilty of such negligence, and that such negligence operated as an efficient cause of the injury to appellee.

It is strenuously urged by counsel for appellant that the negligence in placing the piles of stones near the track in question is to be attributed solely to O'Day and Farwell, who had the work of track repairing in charge, and not to appellant, and this upon the theory that the former were independent contractors.

We regard the decision of the Supreme Court in Chicago Economic F. G. Co. v. Myers, 168 Ill. 139, as in point and controlling. In that case the defendant corporation had let the work of laying gas pipes to a construction company. It sought, in defense of the suit, to avail of the doctrine of non-liability of the owner when the work is in exclusive control of an independent contractor. The court, in disposing of the cause, said :

“The appellant was a corporation authorized by its charter to deal in gas. The proof shows that the permit to do all the work connected with the laying of the gas pipes was issued by the Department of Public Works of Chicago to the appellant company, and not to the construction company. The appellant was thus engaged in the work of laying pipes to transmit gas through the public streets of the city under a charter of the State of Illinois, and under a permit from the city of Chicago. It can not, therefore, avoid liability for acts under its corporate franchises by simply letting a contract to a construction company. Even though the person who causes the injury is a contractor, he will be regarded as the servant or agent of the corporation for whom he is doing the work, if he is exercising some chartered privilege or power of such corporation, with its assent, which he could not have exercised independently of the charter of such corporation. ‘In other words, a company seeking and accepting a special charter must take the responsibility of seeing that no wrong is done through its chartered powers by persons to whom it has permitted their exercise.’ West v. St. Louis, Vandalia and Terre Haute Railroad Company, 63 Ill. 545; Balsley v. St. Louis, Alton and Terre Haute Railroad Co., 119 Id. 68; Toledo and St. Louis Railroad Co. v. Conroy, 39 Ill. App. 351.”

The facts of the case here bring it within the application

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of this decision and cases therein cited. It appears from the evidence that appellant was effecting, through O'Day and Farwell, the repair of its track upon a public street of the city of Chicago, and under the power conferred by its charter and the license of the city. If, as between themselves, O'Day and Farwell are not to be regarded as servants or agents of appellant, yet in relation to the public they must be so regarded when they are exercising some privilege or power of the appellant corporation, with its assent, which they could not have exercised independently of such charter and license.

The same doctrine is announced, as applied to work done under a license from a city, in *Darmstaetter v. Moynahan*, 27 Mich. 188, wherein the court said :

"The work was to be done for plaintiff in error, and under the protection of a license given by the city to him as a personal privilege, and it can not be presumed to have been understood that this license should be used as Kehl might choose, though contrary to its spirit or beyond its import. The license was obtained by the plaintiff in error as his own shield in carrying on a piece of work by and for himself, and the work was done under it by himself by means of Kehl, who was his instrument. If Kehl had been prosecuted for creating a public nuisance, he could not have 'justified in his own right,' but would have been compelled 'to justify as agent' of the plaintiff in error under his contract. I am therefore of the opinion that the relations between Kehl and the plaintiff in error were such in respect to the creation of the mischievous obstruction as to implicate the latter in responsibility for injuries to third parties not in fault. See *Sadler v. Henlock*, 4 El. & B. 57."

And in *Woodman v. Metropolitan R. R. Co.*, 149 Mass. 335, the rule is applied to work done in laying tracks under a permit issued to the corporation.

We are of opinion that the evidence amply establishes negligence in placing the piles of stones dangerously near the track, and that appellant is chargeable with that negligence.

It is also urged by counsel for appellant that even if there was negligence in this behalf which can be imputed to appellant, yet the evidence fails to establish that such neg-

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ligence was a proximate cause of the injury to appellee. Whether the presence of the piles of stones is shown to have been the cause first operating, and the only cause of the injury, is a matter of no controlling importance; for that it was at any rate a concurring and efficient cause is, we think, fully established. Appellee testified:

“ I left the north-bound train and took the south-bound, and as I was getting off, I got off of the north-bound and went round the front of the grip of the south-bound car up to my car, and there were stones all over there; I was operating the trail car of the south-bound train at that time; I was to take that car, but the stones were piled all along so high that I could not step over, so I went to the rear to get on; but the stones were high there, and I could not get on without going way back and walking round, so that when I did not want to lose too much time here, I walked to the front end to see if I could find a place where I could step over; I was at the front end, and there was a place where they were not quite so high, and I stepped over, and had the register under my arm, and was getting on with my right hand; had hold of the handle and the stones; the rail was about a foot and a half at that place; some places they were closer, some places further; some places piled up to the curb, and just as I stepped the car started and I fell forward, slanting, and struck on my head and shoulder, and the stones forced me back under the footboard, and the footboard rolled me over till the car got clear over me.”

It is apparent, and from evidence not contradicted, that had it not been for the presence of the piles of stone this injury would not have resulted. In other words, the negligence charged was a cause, and an efficient cause, of the injury, and if the starting of the car before appellee had sufficient time to get aboard was also a concurring cause, it does not operate to free appellant from liability for negligence in the placing of the piles of stone. U. Ry. & Transit Co. v. Schacklet, 119 Ill. 232; Village v. Cook, 129 Ill. 152; C. L M. Co. v. Keifer, 134 Ill. 481; St. Louis B. Co. v. Miller, 138 Ill. 465; Pullman P. C. Co. v. Laack, 143 Ill. 242; City v. Shufeldt, 144 Ill. 403; City v. Woolsey, 47 Ill. App. 447.

In the Miller case, *supra*, the facts are that the plaintiff was crossing a bridge of the defendant which lacked proper

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railings between the footpath and the carriage way. A drove of mules was driven over the carriage way, and by reason of the lack of a proper railing some of the mules got into the footpath and injured the plaintiff.

The court said :

"There is a sense in which it may be said that the injury was caused by the persons in charge of the mules, since if they had not undertaken to drive said mules over the bridge the injury would manifestly not have happened. But this is not inconsistent with the further fact that the injury was also caused by the negligence of the defendant in not providing proper railings or barriers and it is only in the sense here indicated that the instruction in order to be applicable to the facts as proved, could have referred to the injury as being caused by the persons in charge of the mules. In legal contemplation, the case is one where the injury was inflicted by the co-operating negligence of the bridge company and the persons in charge of the mules, and the rule is well settled 'that a person contributing to a tort, whether his fellow-contributors are men, natural or other forces, or things, is responsible for the whole, the same as though he had done all without help.' Village of Centerville v. Cook, 129 Ill. 152; Bishop's Non-Contract Law, Sec. 518. The proposition of the instruction, then, that the plaintiff could not recover if she was injured by third persons not under control of the defendant, when applied to the evidence before the jury, was clearly misleading and erroneous."

In Gonzales v. City, 84 Tex. 3, the facts were that lumber was negligently piled in a public street of the defendant city. A drayman in passing struck the pile of lumber and caused it to fall, injuring the plaintiff. The court, in applying the doctrine above announced, said :

"It is true if the drayman had not run his load against the lumber the accident would not have occurred, and, on the other hand, if the lumber had not been in the street it would not have occurred. Dispense with either of these facts and there would have been no injury. * * * If the presence of the lumber pile in the street was chargeable to the negligence of the city, and such negligence, together with the act of the drayman, caused the injury, it would be in part the proximate cause. * * * By proximate cause we do not mean the last act of cause, or nearest act to the injury, but such act wanting in ordinary care as

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actively aided in producing the injury as a direct and existing cause."

In the case here, although the fault of the other conductor or the gripman, in improperly starting the train before appellee had got aboard, was a concurring cause in producing the injury, yet the negligence of appellant in having the piles of stones placed dangerously near the track was also a cause, and an efficient cause, of that injury.

It is also urged by counsel for appellant that the hazard resulting from the condition of the track was assumed by appellee. It appears from the evidence that appellee had repeatedly passed over this track on the trains upon which he was acting as conductor. But it does not appear that he had ever had any previous occasion to stop at this point or to get off or on cars there. While it might be argued from the evidence that appellee must have seen this temporary condition and known of it before the time of the injury, yet it could not therefrom be reasonably inferred that he should or could have anticipated any danger to himself from such condition. There was no danger to him while simply passing over the track upon his car. He can not be held obliged to anticipate this order to transfer train crews at this point, and the possible danger therefrom arising because of the piles of stones there. To have known the condition, without knowing the dangers therefrom arising, will not operate to make it of necessity an assumed risk. C. & N. W. R. R. Co. v. Swett, 45 Ill. 197; Consolidated C. Co. v. Haenni, 146 Ill. 614; Ill. Steel Co. v. Schymowski, 162 Ill. 447.

Nor could the danger arising from the condition of the track, by which the injury was caused, be said to have been one of the usual dangers or risks incident to appellee's employment. The jury were amply instructed at the instance of appellant upon the law as to assumed hazards, and they found, as we think properly, that this was not a risk assumed by appellee.

The court refused to give the following instruction tendered by appellant:

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"The jury are instructed that while the law permits the plaintiff in the case to testify in his own behalf, nevertheless the jury have the right, in weighing his evidence, to determine how much credence is to be given to it, and to take into consideration that he is the plaintiff and interested in the result of the suit."

Whether the giving or refusing of a like instruction is error seems to depend upon the facts of any given case. If there be witnesses on behalf of each litigant, who can be said to be parties in interest, then the instruction is obnoxious as singling out a particular witness; and has been so held in Phoenix Ins. Co. v. La Point, 118 Ill. 384; Penn Co. v. Versten, 140 Ill. 637; Parlin v. Finfrouch, 65 Ill. App. 174; Arnold v. Pucher, 83 Ill. App. 182.

When, however, there is no witness for the defendant who can be said to be interested in the result of the suit, the singling out of the single witness who comes under the application of the rule can not be held as objectionable.

A similar instruction has been approved in W. C. St. Ry. Co. v. Estep, 162 Ill. 130, and in W. C. St. Ry. Co. v. Dougherty, 170 Ill. 379, in neither of which cases was the vice of singling out considered in relation to the instruction and the facts of the respective cases.

In this case there were but two witnesses for the appellant, neither of whom could by any construction be considered a witness interested in the result of the suit. Hence the instruction should have been given. But we regard the refusal as error without prejudice. There was no substantial conflict between the testimony given by appellee and that of any other witness upon any matter material to the issues. There was but little conflict of evidence in the case, and practically none upon matters controlling.

No objection to other rulings upon instructions is argued.

The objection that the permit to appellant to repair the tracks, issued by the city, was not formally admitted in evidence, we regard as not tenable. It was admitted by counsel at the trial that appellant applied for the permit, and that it was issued upon such application. It was also admitted that appellant was chartered by the State to

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operate a street railroad along the street in question. The trial court evidently treated the permit as having been offered and admitted in evidence. The only remaining question is as to the extent of the damages. It is objected that the verdict is for an excessive amount. To this we can not assent.

Without discussing the evidence at length, it is enough to say that it discloses that appellee is, as a result of his injuries, permanently crippled and rendered almost helpless. He can not, unaided, dress or feed himself. Appellant offered no evidence as to the extent of the injuries. The physician who testified on behalf of appellee stated that there was stiffening and immobility of one arm, and a false joint, from compound fracture, which never had united, upon the other, and that the conditions are permanent. From these conditions the physician testified that appellee has only a limited and slight use or motion of the arm, less than one-tenth of the normal. From this testimony, the statement of appellee, in his testimony, that since the injury he can not do anything and is helpless to even care for himself in matters of dressing and feeding, is clearly established. We think the damages awarded are not unreasonable.

The judgment is affirmed.

E. M. Condit v. A. V. Lee, Justice of the Peace.

1. **Costs—Jury Fees, in Criminal Prosecutions.**—A person on trial for a criminal offense before a justice of the peace is entitled to a jury trial without advancing the fees of the jury.

2. **SAME—Advancing Jury Fees.**—In criminal prosecutions before justices of the peace neither the people nor the prosecuting witness can be required to advance jury fees.

Mandamus.—Appeal from the Circuit Court of Cook County; the Hon. JOHN GIBBONS, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1898. Reversed and remanded. Opinion filed July 11, 1899.

J. W. BURDETTE, attorney for appellant.

No appearance for appellee.

MR. JUSTICE HORTON delivered the opinion of the court.

This is a proceeding for mandamus to compel a justice of the peace to proceed to summon a jury demanded in a criminal action pending before said justice and to hear and determine the case according to law.

The petition shows that Joseph Aldermatt, arrested and arraigned for trial before the defendant, A. V. Lee, justice of the peace, demanded a jury trial, and that a demand was made on the justice to summon a jury and try the cause, and that the justice refused to proceed.

E. M. Condit, as relator, filed a petition for a mandamus in the Circuit Court. Lee demurred to the petition in the Circuit Court, and the demurrer was sustained and judgment entered against the relator for costs. The relator appealed to this court.

The appellee has filed no brief in this case. If it were a rule of this court, as it is of some reviewing courts, that where the appellee files no brief the judgment will be reversed, such rule would be enforced in this case with pleasure.

The accused, when brought before the appellee, was entitled to have his cause tried by a jury. His demand for a jury should have been granted. He could not be legally required to advance jury fees. Sec. 167, Ch. 79, Hurd's Rev. Stat. of Ill., is as follows, viz.:

"The person accused may have the cause tried by a jury upon the same conditions, and the jury shall be summoned and impaneled in the same manner as in civil cases before justices of the peace. The defendant shall not be required to advance the jury fees."

In civil cases, before justices of the peace, "either party may have the cause tried by a jury if he shall so demand before the trial is entered upon, and will first pay the fees of the jurors." Hurd's Stat., Ch. 79, Sec. 4S.

We are not aware of any statute, or any law, or any re-

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ported case, which requires one party to advance the fees for a jury which he does not call for and which is demanded by the opposite party.

Counsel for appellant, in his printed argument, makes this statement, viz.:

“The only reason urged by the appellee for refusing to summon a jury at the time demand was made on him so to do, and the only reason urged by his counsel before the Circuit Court, and the only reason given by the Circuit Court for sustaining the demurrer, was that the complaining witness in the action against Aldermatt declined to advance fees for the jury in the justice court, and that the justice was not obliged to summon a jury unless and until fees for the jury were advanced and paid into court. No other point has been advanced at any time during this contention.”

The case before said justice of the peace was by the people of the State of Illinois. The State is never bound to pay costs except in some particular way pointed out by statute. People v. Pierce, 1 Gilm. 553.

As against the people, *i. e.*, the State, a juror in a criminal case before a justice of the peace is not entitled to any fees in Cook county. Whether the State has established a different rule in counties of the first and second class it is not necessary here to determine. See Hurd’s Stat., Ch. 53, Sec. 40.

Upon what theory it can be successfully contended that it is the duty of the prosecuting witness to advance the jury fees in a people’s case we can not imagine. The people can not be required to advance the jury fees in a criminal case before a justice of the peace—neither can the prosecuting witness be required to do so. The statute specially provides that the defendant shall not be required to make such advance. The result is that if the justice of the peace is in duty bound to issue a venire and summon a jury in such a case, and he declines so to do, all that is necessary for a defendant then to do to prevent his prosecution is to demand a jury. To contend that the people are so powerless, and are thus dependent upon the grace and favor of a justice of the peace, is absurd.

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The following statement in the printed argument of counsel for defendant, if correct, shows the result of such absurdity, viz.:

"In more than forty other cases against offenders then pending, some before appellee and some before a neighboring justice, the defendants immediately, upon learning the attitude of appellees in the case before him, gave notice that they would pursue the same course as the defendant Aldermatt, and the prosecutions were temporarily abandoned until this question could be adjudicated."

The judgment of the Circuit Court is reversed and the cause remanded. The Circuit Court will overrule the demurrer to the petition, with leave to the respondent to plead or answer, as he may be advised, and in default of such plea or answer will issue the writ of mandamus, pursuant to the prayer of such petition. Reversed and remanded.

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Stephen W. Cox v. City of Chicago.

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1. EVIDENCE—*Of Accident Insurance in Personal Injury Cases.*—In an action for personal injuries resulting from a defective sidewalk, it is error to admit testimony showing that at the time of his injury the plaintiff was carrying an accident insurance policy, and that the insurance company paid him \$150 on account of his injury.

2. INSTRUCTIONS—*Error in, May Be Waived.*—Under the evidence in this case it was error to instruct the jury that the plaintiff could not recover for any loss of time or loss of money that may have resulted from the alleged accident; nor is he entitled to recover for any pecuniary loss resulting from disability, if any, to attend to his profession or business, nor for any expenses, if any, incurred in endeavoring to be cured of his alleged injuries; but such error was cured by stipulations or admissions, or other controlling facts in the record.

Action in Case, for personal injuries. Trial in the Superior Court of Cook County; the Hon. FARLIN Q. BALL, Judge, presiding. Verdict and judgment for defendant; appeal by plaintiff. Heard in the Branch Appellate Court at the October term, 1898. Opinion filed July 11, 1899.

A. B. CHILCOAT and KING & GROSSE, attorneys for appellant.

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MILES J. DEVINE and QUIN O'BRIEN, attorneys for appellee.

MR. JUSTICE HORTON delivered the opinion of the court.

March 5, 1896, in the early evening, appellant stepped into a hole in the sidewalk on Nassau street, Chicago. He fell and was injured. It was a plank walk, and the hole was caused by one of the planks being broken near the center of the walk. The walk was about thirty inches above the ground. The hole in the walk was less than 200 feet from appellant's residence.

December 21 and 22, 1895, there was a hole in this walk at the place where appellant was injured. While the walk was in that condition, and about January 1, 1896, appellant passed over the place. About January 22, 1896, a board or plank was nailed into the place where the plank had been broken which occasioned the hole. "About a week and a half" afterward that board was broken and there was again a hole in the walk in the same place as before. Who caused the walk to be repaired does not appear. That appellant stepped into this hole, and was more or less injured, is not denied.

About December 22, 1895, one of the city policemen was notified of the existence of the hole then in the sidewalk in question. Whether that is in law a notice to the city it is not necessary here to consider, because after that, and before appellant was injured, the walk was repaired. There is no evidence of any notice to the city of the break which caused the hole after the walk had been repaired.

The questions of actual notice and of presumptive notice to the city were fully and fairly submitted to the jury by the instructions of the court. It is, however, contended by counsel for appellant that the court erred in refusing to give the fifteenth instruction asked by them, relating to the duty of the city as to the care of sidewalks. Whether this instruction is correct it is not necessary to here inquire. The propositions contained in that instruction are fully covered by appellant's twelfth, thirteenth and fourteenth instructions.

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Counsel for appellant contend that it was error to refuse their sixteenth instruction. We think not. That instruction relates entirely to an alleged negligence on the part of the city in not providing a hand-rail or guard at that part of the walk where appellant was injured. There is no evidence tending to show that appellant was injured because of the absence of such a hand-rail. Even if the city was negligent in that regard, yet if appellant was not injured by reason of such negligence, he could not recover on account thereof. To entitle appellant to recover he must show that the negligence of the city was the proximate cause of the injury complained of. And, besides, this instruction omits the element of care and caution on the part of appellant. It was properly refused.

At the time of his injury appellant was carrying an accident insurance policy. Appellee was allowed to prove, against the objection of appellant, that the insurance company paid to appellant \$150 on account of his injury. The court also instructed the jury as follows, viz.:

“The court instructs the jury that under the evidence in this case, the plaintiff can not recover for any loss of time or loss of money that may have resulted from the alleged accident; nor is he entitled to recover for any pecuniary loss resulting from disability, if any, to attend to his profession or business, nor for any expenses, if any, incurred in endeavoring to be cured of his alleged injuries.”

The admission of such testimony and the giving of that instruction are clearly erroneous unless waived or cured by stipulations or admissions, or other controlling facts in the record.

Counsel for appellee, in their brief, cite to this court, from the record, numerous statements and admissions by attorneys for appellant at the time of the trial and in the presence of the jury. None of these appear in the abstract of record filed by counsel for appellant. When considered in connection with these statements and admissions as to certain items mentioned in said instruction, and in the absence of any testimony tending to show damage to appellant for the other items embraced in said instruction, the giving of such instruction was not an error.

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Said instruction, and the testimony to which objection is made, relate only to the question of damages. The jury found that the city was not liable for any damages. The questions as to negligence on the part of the city, and the exercise of due care and caution on the part of appellant, being fully presented to the jury under the instructions of the court, the jury must have found the issues upon these questions in favor of appellee. That being so, any error in the instructions or in the admission of testimony pertaining solely to the question of the amount of damages, if there was any such error, is not a ground for reversal.

The trial court and the jury saw the parties and the witnesses, and heard the testimony and the statements and admissions of counsel. We see no ground which would warrant us in setting aside the verdict of the jury and the judgment of the trial court.

The judgment of the Superior Court is affirmed.

**Jules Lang, D. Walter Evans and D. M. Ottenheimer,
Copartners as Lang, Evans & Co., v. J. Henry Lane,
James Warren Lane, James Freeman Brown and Y.
Coit Johnson, Copartners as J. H. Lane & Co.**

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1. **ACCORD AND SATISFACTION—*What Constitutes.***—To constitute an accord and satisfaction of a claim unliquidated and in dispute, it is necessary that the money should be offered in satisfaction of the claim, and the offer accompanied with such acts and declarations as amount to a condition that if the money is accepted it is to be in satisfaction, and such that the party to whom it is offered is bound to understand therefrom that if he takes it he takes it subject to such condition.

2. **SAME—*Tender of.***—When a tender is made as an accord and satisfaction, the party to whom it is made has no alternative but to refuse it, or accept it upon the conditions accompanying the tender. If he takes it his claim is canceled, and no protest, declaration or denial of his, so long as the conditions are insisted upon, can vary the result.

3. **SAME—*Requisites of the Offer.***—The party seeking to settle for a less sum than is claimed to be due, must, by his words and conduct when making the offer, clearly inform the other of what is sought and

expected. The condition must be as plain as the tender, so that the acceptance of the tender will involve the acceptance of the condition.

4. *SAME—Conditions Incapable of Severance.*—The tender and the condition must be incapable of severance, otherwise the inference will not follow that the acceptance of the tender involves the acceptance of the condition.

5. *SAME—Checks Sent to be Accepted in Full Payment of an Unliquidated Account.*—Where a check is sent in payment of an unliquidated and disputed account, accompanied by a letter to the creditor notifying him that the check is in payment of certain specified bills, if the creditor does not wish to accept the same in payment of such bills, and wishes to hold the debtor for the amount claimed, it is his duty to return the check.

6. *CHECKS—Offer of Adjustment of Disputed Claims by.*—When a check for a lesser amount than is claimed is sent in payment of a disputed claim, the creditor must return such check to the sender if he wishes to enforce his entire claim.

7. *WAIVER—Of Conditions in Sending a Check for Payment.*—A debtor may waive his right to have a check, sent in payment of a disputed claim, applied in satisfaction of such claim.

Assumpsit.—Trial in the Circuit Court of Cook County; the Hon. RICHARD W. CLIFFORD, Judge, presiding. Finding and judgment for plaintiffs; appeal by defendants. Heard in the Branch Appellate Court at the October term, 1898. Affirmed. Opinion filed July 11, 1899.

Statement of Facts.—This case was heard by the Circuit Court without a jury, upon agreed facts, and the testimony of two witnesses for appellees and one for appellants.

Appellants were copartners doing a mercantile business in Chicago, and appellees were copartners doing a like business in New York, and had dealings together, in the course of which appellees sent to appellants a statement of account, showing an indebtedness from appellants to appellees of \$306.57, which it is conceded correctly represented all bills for which appellants were then indebted to appellees.

Prior to that time, however, appellants had contracted with appellees for another bill of goods, for the non-delivery of which by appellees, the appellants claimed to have suffered one hundred dollars damages. As to these claimed damages some correspondence took place between the parties, the claim being asserted upon one side and denied upon the other.

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The statement of account referred to was dated June 18, 1897, and on June 21, 1897, appellants returned it to appellees with a notation on the bottom of it as follows: "Less 10,000 yds. at 1 ct., \$100.00," and accompanied it with their bank check for \$206.57, and the following letter:

"CHICAGO, June 21, 1897.

Messrs. J. H. LANE & Co., New York.

GENTLEMEN—Enclosed please find check for \$206.57 in payment of bills March 17, 23, April 12, less \$100 on 10,000 yards at one cent. When we placed order with you, we had several chances to buy drills equally as cheap, but gave your representative the preference. We have repeatedly asked him why you didn't make us a shipment, but he could not give us any satisfactory explanation.

We have seen our attorney and he said we are justified in our claim.

Yours very truly,
LANG, EVANS & Co."

Appellees replied to this letter as follows:

"NEW YORK, June 24, 1897.

Messrs. LANG, EVANS & Co., Chicago, Ill.

GENTLEMEN—Yours of the 21st received, enclosing check for \$206.57. We decline to accept the adjustment. You have no right to make these deductions. There is no legal and equitable cause for it. We have referred the matter to Mr. Spurr to communicate the matter to you, with the hopes that his explanation will enable you to see it in the proper light and that you will adjust it. We further instructed him relative to the contingency of your refusing to do so.

Yours respectfully,

J. H. LANE & Co."

Appellants made no reply to this last letter. Appellees had the check certified by the bank upon which it was drawn, and passed the amount of the check to the credit of appellants. Within a few days thereafter, Mr. Spurr, an agent for appellees, called on appellants and stated that the deduction of \$100 would not be allowed, and that he, Mr. Spurr, was instructed to collect the \$100.

The plaintiffs (appellees) offered to prove that if Mr. Spurr were present at the trial in this case he would testify that during the conversation Mr. Lang (one of the appellees)

lants) said the reason they had deducted \$100 from their remittance was because of the damage they had sustained by the non-fulfillment of their order of March 30, 1897, to which Mr. Spurr replied that the reason that the order of March 30, 1897, was not filled was because they had been delinquent in paying their prior bills, but that Mr. Lang then said that he would give \$70 in payment of the balance of the account, to which Mr. Spurr replied that he did not have authority to settle for less than \$100.

Defendants (appellants) admitted that if Mr. Spurr were present he would testify as above stated, but objected to the introduction of the above statement, on the ground that it is incompetent and inadmissible, because the conversation relates to an offer of compromise.

A witness for appellees testified that he was in the employ of appellees and had a conversation with Mr. Lang, of appellants' firm, in regard to the matter in dispute, subsequent to the time the dispute arose, and a week or ten days subsequent to the receipt of the check. The substance of his testimony, shown by the abstract, is as follows:

"I met Mr. Lang on the street and told him I was sorry the difficulty—sorry for the controversy—thought we had made more than an equitable proposition to settle the matter at \$85; he said that \$70 was all that he would remit.
* * * He never mentioned the check."

Mr. Lang testified for appellants as follows:

"Mr. Spurr came to me twice and asked me if it would not be better to settle this matter out of court. I told him that we had nothing to settle outside of what was paid, but in order to keep the matter out of court I was willing to accept—to stand one-half of the loss. That was the first conversation, and he told me, 'Well, I tell you what I will do, Mr. Lang; all I can do is to allow you attorneys' fees.' I says, 'That depends what attorneys' fees means.' He says, 'From \$10 to \$15.' I would not accept it. A few days after that he came over again. We had the matter talked over again, and I told him, 'As a matter of friendship between you and I, to settle the matter, I will give you a check for \$70 and call it off, but I don't owe you anything.'"

HOFHEIMER & PFLAUM, attorneys for appellants.

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WILBER, ELDREDGE & ALDEN, attorneys for appellees.

In order to make an acceptance of the money sent binding as an accord and satisfaction it is necessary that the money should be offered in satisfaction of the claim and the offer accompanied by such acts and declarations as amount to a condition that if the money is accepted it must be accepted in full satisfaction, and such condition must be so clearly expressed that the party to whom it is offered is bound to understand therefrom that if he takes the money he takes it subject to such condition. Fuller v. Kemp, 138 N. Y. 231; Preston v. Grant, 34 Vt. 201; McDaniels v. Lapham, 21 Vt. 222; Rockford, Rock Island & St. Louis Ry. Co. v. Rose, 72 Ill. 183; Western Union Ry. Co. v. Smith, 75 Ill. 496.

The observance of the condition must be insisted upon and must not admit of the inference that the creditor might keep the money tendered in case he did not accept the condition on which it was offered. Fuller v. Kemp, 138 N. Y. 231.

If there were any condition attached to the offer, it was afterward waived, and that appellants assented to its being applied in part payment, and certainly appellants had a right to modify their offer or withdraw any condition. Fuller v. Kemp, 138 N. Y. 231.

MR. JUSTICE SHEPARD delivered the opinion of the court.

The question is, was there an accord and satisfaction, as a conclusion of law, from the facts in evidence?

“To constitute an accord and satisfaction (of a claim unliquidated and in dispute), it is necessary that the money should be offered in satisfaction of the claim, and the offer accompanied with such acts and declarations as amount to a condition that if the money is accepted it is accepted in satisfaction, and that such party to whom it is offered is bound to understand therefrom that if he takes it, he takes it subject to such condition. When a tender or offer is thus made, the party to whom it is made has no alternative but to refuse it, or accept it upon such condition. If he takes it, his claim is canceled, and no protest, declaration or denial of his, so long as the condition is insisted on, can vary the result.” Preston v. Grant, 34 Vt. 201.

The Court of Appeals of New York (*Fuller v. Kemp*, 138 N. Y. 231), adopting the language, as above, from *Preston v. Grant*, adds:

"To make out the defense the proof must be clear and unequivocal that the observance of the condition was insisted upon, and must not admit of the inference that the debtor intended that his creditor might keep the money tendered, in case he did not assent to the condition upon which it was offered."

The party seeking to settle for a less sum than is claimed to be due, must, by his words and conduct when making the offer, clearly inform the other of what is sought and expected. The transaction must be such as that the condition is as plain as the tender, so that the acceptance of the tender will involve the acceptance of the condition. In other words, the tender and the condition must be incapable of severance, for the law will not otherwise draw the inference that the acceptance of the tender involves the acceptance of the condition.

The case of *Ostrander v. Scott*, 161 Ill. 339, relied upon by appellants, in no manner opposes the rules we have stated, but is in effect in support of them, for it rests upon what it finds, from the facts there existing, was necessarily the understanding and agreement of the parties.

The question in that case, as in this one, goes to the effect to be given to the words and acts of the party in connection with the check. There the check had written upon its face, "in full of all demands to date." Here the check contained no words limiting its effect. There the letter enclosing the check stated that it was "in full of account to date." Here the letter enclosing the check says it is "in payment of bills" of specified dates, "less \$100 on 10,000 yards at one cent." There was also in the *Ostrander* case an element wholly lacking here. There, as soon as the debtors were informed that the check was not accepted by the creditors in full payment, but only as a credit on account, the debtors wrote that the check was sent in full settlement, and demanded it be returned if not so accepted. Here appellants made no reply to appellees' letter declining to assent

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to the deduction, but did afterward offer to pay \$70 of the \$100 that had been deducted.

It would require us to unwarrantably extend the Ostrander case to hold that this case is parallel to that one. The present case is much more like that of Lapp et al. v. Smith, 83 Ill. App. 203, where numerous authorities are reviewed. The case of Hamilton v. Stewart, 31 S. E. Rep. (Ga.) 184, is cited by appellants, but that, like the Ostrander case, turns upon the payment being made upon the condition of its acceptance in full. We are unable to hold that even though this case stood without any question of waiver by appellants, we could reverse the judgment. The learned circuit judge before whom the case was tried, held certain propositions of law which were most favorable to appellants' contention, but held properly, as a modification of one of them, that the debtor might waive his right to have the payment made by him applied in satisfaction, and that the evidence shows in this case there was such a waiver. We fully concur there was such a waiver. The testimony clearly shows what amounts to a waiver by the appellants of any rights they claimed, to have the check applied in full payment. That testimony, even though incompetent in so far as it showed an offer of compromise, was clearly competent to show there was no condition attached to the acceptance of the check, or if there were, that the condition was waived.

The judgment of the Circuit Court is affirmed.

Glens Falls Insurance Co. v. James Hite, Use of, etc.

1. INSURANCE—*Waiver of Right to Demand Appraisal of Property.*—Where an insurance company denies any liability whatever, it has no right to demand an appraisal of the property.

2. GARNISHMENT—*For Unliquidated Damages.*—Under the facts and circumstances of this case, the amount due from the insurance company to the insured was subject to garnishment, although such claim was not adjusted and was disputed by the company.

Attachment Proceedings.—Trial in the Superior Court of Cook County; the Hon. JOHN BARTON PAYNE, Judge, presiding. Verdict and

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judgment for plaintiff; appeal by defendant. Heard in the Branch Appellate Court at the October term, 1898. Affirmed. Opinion filed July 11, 1899.

PADDOCK, WRIGHT & BILLINGS, attorneys for appellant, contended that notice of intention not to perform the obligations of a contract is revocable at any time before the opposite party has acted thereon to his detriment. Therefore, if the insurance company refused to pay the loss, the assured never acted upon the refusal, and such refusal having been subsequently withdrawn, all provisions of the policy remained in full force and effect, including the company's right to an appraisal. Nilson v. Morse, 52 Wis. 252; McPherson v. Walker, 40 Ill. 371; Kadish v. Young, 108 Ill. 170; Roebling's Sons v. Lock Stitch Co., 130 Ill. 660; Zuck v. McClure, 98 Pa. St. 541; Ripley v. McClure, 4 Ex. 345; Avery v. Bowden, 5 E. and B. 714; Hahn v. Guardian Ins. Co., 23 Ore. 576.

Waiver and estoppel, as applied to insurance, are identical, and there can be no estoppel when the assured is not prejudiced by the act of the insurer. May on Insurance, Sections 505 and 507; Ripley v. Aetna Insurance Co., 30 N. Y. 164; Hahn v. Guardian Ins. Co., 23 Ore. 576; Dunning v. Mauzy, 49 Ill. 368; Robinson v. Penn. Ins. Co., 90 Me. 385; Stockhouse v. Barnston, 10 Ves. Jr. 466.

EDWARD J. WALSH, attorney for the Bauer Company, interpleader.

THORNTON & CHANCELLOR, attorneys for appellee, Hite. Denying liability on the policy, the company could not at the same time demand an appraisement. Hughes v. London, 4 Ont. 293; McInnes v. Western, 5 Ont. Pr. 242.

Denial of all liability waives proofs of loss and time to bring suit. Grange Mill Co. v. West. A. Co., 118 Ill. 396; Continental Ins. Co. v. Ruckman, 127 Ill. 364.

The refusal to pay the loss waives proofs of loss. Boyd v. Cedar Rapids Ins. Co., 70 Ia. 325.

Where the company places its refusal to pay the loss on

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some alleged misconduct of the insured, this waives compliance with the other provisions. *Searle v. Dwelling House Ins. Co.*, 152 Mass. 263; *Dietz v. Providence*, 33 W. Va. 526; *German Ins. Co. v. Gueck*, 130 Ill. 345.

In order that an insurance company may avail itself of the arbitration clause of a policy, it must show that it admits the validity of the policy, and that the only question is as to the extent of the loss. *Menz v. Armenia*, 79 Pa. St. 478. When the company denies all liability the appraisement clause is inoperative. *Lasher v. N. W. Ins. Co.*, 18 Hun, 98; *German, etc., Ins. Co. v. Etherton*, 25 Neb. 505; *Wainer v. Milford*, 153 Mass. 335; *Pencil v. Home Ins. Co.*, 3 Wash. 485.

MR. JUSTICE HORTON delivered the opinion of the court.

This is a suit in attachment brought by Phillip Chancellor against James Hite. The appellant was summoned as a garnishee. Judgment was entered against defendant, Hite.

By its answer as garnishee, appellant stated that it issued its fire insurance policy to said Hite, insuring household furniture; that the property insured was destroyed by fire; that it denied that the amount claimed by Hite was just and correct; that it demanded that the amount of loss be ascertained by appraisers under the provisions of the policy of insurance; that said Hite neglected and refused to join in such appraisal; that the loss was still unadjusted; and that appellant had received written notice from Julius Bauer & Co. that said Hite had assigned to them \$365 of the amount due him on said policy.

Julius Bauer & Co. interpled, setting up their claim, but by reason of some adjustment between the parties, they are not interested in this appeal.

In appellant's abstract of the record in this case we find the following, being an abstract of a part of the testimony of Hite, and referring to the office of Mr. Wright, an adjuster employed by appellant to represent it in adjusting the claim made under said policy, viz.:

“I came there—I guess he kept me coming there every

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other day for two weeks, and then one morning Mr. Barrett and I went there, and Mr. Wright went out in the other room and got his gun—his revolver—and laid it down on the desk. This took place at Mr. Wright's office on La Salle street; I don't know the number. He says: 'Hite, you burned that house down or know who did it, and we will never pay a dollar until we pay it at the end of the Supreme Court.'"

Again in the abstract of Mr. Hite's cross-examination we find the following, viz.:

"Mr. Wright went in and got a gun and brought it out and laid it down on his desk, and he got up and accused me of setting the house afire. As near as I can recollect it was a gun that broke in the back. I mean a revolver. He didn't point it at me. I and Barrett came there together. Wright was alone, as far as I recollect. His father came in a few minutes afterward."

This Mr. Wright was called as a witness by appellant. In the abstract of his direct examination is the following, viz.:

"I have heard him (Hite) testify on the stand both to-day and on Friday, and heard him testify concerning a conversation that took place in my office upon the occasion when he said I pulled a gun. I believe I remember the occasion; it was quite a while ago, and it was pretty hard to remember the exact facts; the exact times. I had several interviews with Mr. Hite." * * * "We had some words about it and I expressed my opinion that he set the house on fire. I never pulled a gun on him. I assume this occasion is the one that he has spoken of. To the best of my recollection I never had a gun. I certainly never pulled a gun on Mr. Hite or any other man."

"The Court: The question is, is it true that you did what he said ?

"A. I would not swear to that. It was so long ago I can not remember. I might possibly have had something of that kind in my desk, but I never used it or pulled it on anybody. I might have had it, but don't remember."

He was not cross-examined as to this. That was quite unnecessary.

We trust that this shows a very exceptional case of the conduct of an insurance adjuster. This one has a very

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remarkable and discriminating memory. He swears positively that he did not say to Hite at this gun interview that the appellant would not pay any part of the loss claimed until defeated in the Supreme Court. He also states other details of that interview. But when asked by the court if what Hite stated as to the revolver was true, he said, "it was so long ago I can not remember. * * * I might have had it, but don't remember."

Assuming Mr. Hite's testimony as to the adjuster's conduct and statements to be true, that was a waiver of the right of appellant to demand an appraisal. If Hite set the house on fire, or caused that to be done, as charged by the adjuster, he was not entitled to collect or receive any sum whatever from appellant upon the policy in question. There was then no reason why an appraisal should be made. Appellant not being, in such case, liable to pay for the property destroyed, and having no interest therein, was not entitled to require an appraisal thereof. The two positions are inconsistent. That is to say, when the appellant denies any liability whatever it has no right to demand an appraisal of the property.

Upon what the adjuster based his statement that Hite burned the property, or caused it to be done, this record does not disclose. There is in the record no testimony justifying such a statement. In arriving at their verdict, the jury must have found, under the instructions of the court, that the testimony of Hite as to the adjuster's conduct and statements, was substantially true. We see no reason why this court should question the correctness of that finding.

Assuming, as we must upon the record before us, that the acts and statements by the adjuster who represented appellant in this matter, were substantially as testified to by Hite, then Hite was thereby excused from acceding to or complying with the demand of appellant afterward made, "that the matter of the amount of the loss and damage be submitted to appraisers."

When the adjuster stated to Hite that the company would "never pay a dollar until we pay it at the end of the Supreme

Court," in connection with his further statement that the company was not liable because Hite had himself burned the property, the adjuster thereby waived for the company all right to demand an appraisal. The position and statement by the adjuster was never withdrawn or receded from by or on the part of the company.

Mr. Hite made proof of loss to appellant after the interview with the adjuster when the revolver was produced, and the statements made by the adjuster above quoted from the record. After waiting the necessary length of time required by the policy this suit was commenced. Under the facts and circumstances appearing in this record, it is not a good defense on the part of the company to say that no appraisal was made as demanded by the adjuster.

It is urged by appellant that as the claim of Hite was not adjusted and was disputed by the company, that garnishment can not be sustained, because such claim is for unliquidated damages. We can not concur in this contention. Under the facts and circumstances of this case, the amount due from the company to Hite was subject to garnishment.

The policy in question is for the sum of \$700. The verdict of the jury is for the sum of \$450. The verdict of the jury must control as to the amount of the loss.

As to the numerous other points presented by the counsel for appellant, it is sufficient to say that we perceive no reversible error.

The judgment of the Superior Court is affirmed.

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Myra Reid v. City of Chicago.

1. CITIES AND VILLAGES—*Liability for Injuries—Defective Sidewalks.*—A municipal corporation is liable to persons injured by its defective sidewalks, where the city through its proper officers knows, or might by the exercise of ordinary diligence be presumed to know, that the walk was out of repair and in a dangerous condition, and a reasonably sufficient time has elapsed, after such knowledge and before the injury, within which to make the necessary repairs.

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2. **SAME—Notice Not Essential.**—It is not essential to a recovery for injuries to persons by reason of defective sidewalks, that the evidence should show actual notice to the city of the defective and dangerous condition of the walk.

3. **SAME—Duty Regarding Sidewalks—Constructive Notice.**—It is the duty of cities and villages to keep their streets and sidewalks in a reasonably safe condition for people to travel over, and when a sidewalk in a public street gets out of repair, so that it is unsafe to travel upon, and so remains for a considerable time, notice of the defective condition of the walk will be presumed.

4. **SAME—Notice to Police Officers.**—Courts take notice that the affairs of a large city are administered through different departments whose spheres of duty are entirely independent of each other; and to charge the officers in charge of streets and sidewalks with notice of everything concerning their condition that may come to the attention of a police officer without, at least, showing in the first instance, or offering to show later as a condition of the admission of the evidence, that the police officer was charged with a duty in such respect, would lead to great abuse, and would open up numerous collateral issues that ought not to be allowed to creep into the case on trial.

Action in Case, for personal injuries. Trial in the Circuit Court of Cook County; the Hon. ELBRIDGE HANEY, Judge, presiding. Verdict and judgment for defendant: error by plaintiff. Heard in the Branch Appellate Court at the October term, 1898. Affirmed. Opinion filed July 11, 1899.

S. P. DOUTHART, attorney for plaintiff in error.

No appearance by defendant in error.

MR. JUSTICE SHEPARD delivered the opinion of the court. The plaintiff sued the city to recover for damages alleged to have been suffered by her by reason of falling through a defective sidewalk.

No evidence was introduced by the city, and the jury, without instructions, returned a verdict of not guilty.

The facts that the sidewalk was defective and that the plaintiff fell through it because of such defect, and that she was at that time in the exercise of ordinary care for her own safety, were established by the evidence, and if plaintiff's right to recover depended upon such matters only, the verdict was wrong. Two other facts, however, remained to be established by the evidence, to the satisfaction of the

jury: one was, whether the plaintiff was injured, and the other was, had the city notice of the defect in the walk, either actual or constructive.

The evidence of injury is not so convincing as to justify us in saying that the verdict was manifestly wrong with respect to that. But even had the jury found with the plaintiff upon that question, notice to the city, or what is equivalent to notice to it, of the existence of the defect in the walk, must have been shown before a verdict against the city could have been rightfully returned.

A municipal corporation is liable to persons injured by its defective sidewalks, where the city, through its proper officers, knows, or might by the exercise of ordinary diligence be presumed to know, that the walk was out of repair and in a dangerous condition, and a reasonably sufficient time has elapsed after such knowledge and before the injury, within which to make the necessary repairs. *City of Peru v. French*, 55 Ill. 317.

It is not essential to a recovery for injuries to persons, so occasioned, that the evidence should show actual notice to the city of the defective and dangerous condition of the walk.

"It is the duty of a city to keep its streets and sidewalks in a reasonably safe condition for people to travel over, and when a sidewalk in a public street gets out of repair, so that it is unsafe to travel upon, and so remains for a considerable time, notice of the defective condition of the walk will be presumed." *City of Chicago v. Dalle*, 115 Ill. 386; *City of Sterling v. Merrill*, 124 Ill. 522.

For the purpose of showing notice to the city, the plaintiff asked a witness who testified to the bad condition of the walk in question, if he had ever said anything about it to the police officer who traveled that beat, and if he ever reported it to any of the police officers within that district.

The questions were objected to and ruled out by the court. Such ruling was, we think, clearly proper. Courts may know, what everybody else knows, that the affairs of a large city, like Chicago, are administered through different departments, whose spheres of duty are entirely

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independent of each other; and to charge the officers having control of streets and sidewalks with notice of everything concerning their condition that may come to the attention of a police officer, without at least showing, in the first instance, or offering to show later, as a condition of the admission of the evidence, that the police officer was charged with a duty in such respect, would lead to great abuse, and would open up numerous collateral issues that ought not to be allowed to creep into the case on trial. *City of Joliet v. Looney*, 159 Ill. 471.

It is not unlikely that counsel for plaintiff had in mind that it was necessary to show a duty in such regard by the police officers, for he asked the same witness, "What instruction was given by any of the officers of the city to the policeman who traveled the beat, with reference to sidewalks, if any, that you know?"

That question was likewise ruled out upon objection, and properly so.

In the first place, it does not appear that the witness knew that instructions of any sort, in connection with the subject of the inquiry, were ever given to the policeman in question. True, the witness had formerly been a police sergeant, but such fact does not necessarily imply his knowledge in such respect. The more serious objection to the question is that it is directed to instructions "given by any of the officers of the city." The city attorney is an officer of the city; so is the city clerk, the city treasurer, the comptroller, the oil inspector and the fire marshal; but it would be absurd to hold that the city would be bound by notice given to a policeman in pursuance of the instructions of one of such officers.

What officer, or department authority, might confer a duty upon a police patrolman such as would charge the city with notice of what he was notified concerning, we expressly do not here decide, nor do we decide any one of the other numerous questions that may be suggested by the discussion, except the one that the question was properly ruled out.

There was, therefore, no evidence in the case, of actual

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notice to the city. And, by necessary intendment of the verdict of the jury, it is settled that under the evidence the city was not bound by presumptive notice of the defect.

We have, unaided by those whose duty it was to file briefs here in behalf of the city, come to the conclusion that there is no error in the record, to which our attention has been called, and the judgment of the Circuit Court is affirmed.

Allegretti Chocolate Cream Co. et al. v. B. F. Rubel et al.

1. **LIBELS—*Injunction to Restrain the Publication of.***—A court of chancery will not interfere by injunction to restrain the publication of a libel.

2. **INJUNCTIONS—*Equity Jurisdiction to Restrain Libels.***—A court of equity can not, under its common law powers, by injunction, restrain the publication of a mere libel.

Bill for Injunction.—Trial in the Superior Court of Cook County; the Hon. FARLIN Q. BALL, Judge, presiding. Decree for complainants; appeal by defendants. Heard in the Branch Appellate Court at the October term, 1898. Reversed and remanded. Opinion filed July 11, 1899.

DARROW, THOMAS & THOMPSON, and DOUGLAS C. GREGG, attorneys for appellants.

That a court of equity can not, under its common law powers, by injunction, restrain the publication of a mere libel, seems to be most in accordance with the authorities in this country, as well as in England. *Boston Dietite Co. v. Florence Mfg. Co.*, 114 Mass. 69; *Newell on Libel and Slander* (2d Ed.), 246a, 246b; *High on Injunctions*, Sections 1015-1093; *Whitehead v. Kitson*, 119 Mass. 484; *Life Association of America v. Boogher*, 3 Mo. App. 173; *Baltimore Car Wheel Co. v. Bemis*, 29 Fed. Rep. 95; *Mauger v. Dick*, 55 How. Pr. 132; *Singer Mfg. Co. v. Domestic Sewing Machine Co.*, 49 Ga. 70.

In the absence of statutory provision conferring such jurisdiction, the question is so fully and clearly discussed in the leading decisions that we no more than cite them: *Pru-*

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dential Assurance Co. v. Knott, L. R., 10 Ch. 142; Boston Dietite Co. v. Florence Manufacturing Co., 114 Mass. 69; Kidd v. Horry, 28 Fed. Rep. 773; Everett Piano Co. v. Bent, 60 Ill. App. 372. See also Clark v. Freeman, 11 Beavan Rep. 112; Flint v. Hutchinson Smoke Burner Co., 110 Mo. 492; Baltimore Car Wheel Co. v. Bemis, 29 Fed. Rep. 95; Dicks v. Brooks, L. R., 15 Ch. Div. 22-29; Halsey v. Brotherhood, L. R., 19 Ch. Div. 386; Whitehead v. Kitson, 119 Mass. 484; N. Y. Juvenile, etc., Society v. Roosevelt, 7 Daly, 188; Brändreth v. Lance, 8 Paige, 24; Mauger v. Dick, 55 How. Pr. 132; Caswell v. Central R. R. Co., 50 Ga. 70; Life Ass'n of America v. Boogher, 3 Mo. App. 173; Singer Co. v. Domestic Co., 49 Ga. 70; Raymond v. Russell, 143 Mass. 295; De Wick v. Dobson, 46 N. Y. Supp.; Reyes v. Middleton, 29 L. R. A. 66-68; Mead v. Stirling, 62 Conn. 586.

The recent English cases, such as Dixon v. Holden, L. R., 7 Eq. 488; Thorley's Cattle Food Co. v. Massan, 14 Ch. Div. 763; Thomas v. Williams, Id. 864, and Loog v. Bean, 26 Ch. Div. 306, depend on certain peculiar acts of Parliament of Great Britain and not on the general principle of equity jurisprudence.

So it may be regarded as well settled that a court of equity will never lend its aid by injunction to restrain the libeling or slandering of title to property where there is no breach of trust or contract involved, but that in such cases the remedy, if any, is at law, and that the alleged insolvency of the libelant in such cases will not of itself authorize the interference of a court of equity. Boston Dietite Co. v. Florence Mfg. Co., 114 Mass. 69; Wetmore v. Scovell, 3 Edward's Ch. (N. Y.) 523; Brändreth v. Lance, 8 Paige, 24; Mauger v. Dick, 55 How. Pr. 132; Life Ass'n of America v. Boogher, 3 Mo. App. 173; Singer Mfg. Co. v. Domestic Sewing Machine Co., 49 Ga. 70; Clark v. Freeman, 11 Beavan, 112; Seeley v. Fisher, 11 Sim. 581; Prudential Assurance Co. v. Knott, L. R., 10 Ch. App. 142.

CLYDE E. MARSH, attorney for appellees, Dow, WALKER & WALKER, of counsel, contended that inasmuch as the

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appellant and its officers have submitted this cause to the court and the court has passed on the respective rights of the parties and entered a decree fixing the manner in which the firm name of Allegretti & Rubel should be used, and that the court has also passed on the question affirmatively that Allegretti & Rubel are using their firm name in compliance with the decree of June 1, 1897, all of which is set out in the bill of complaint, the publication and distribution of the circular complained of, by reason of the fact that the original case is at an end and the court has lost jurisdiction to enter any orders therein, should be enjoined as a trade libel and as unfair competition in the suit at bar, and appellees rely on the following cases: William Rogers Mfg. Co. v. Rogers & Spurr Mfg. Co., 11 Fed. Rep. 495; Emack v. Kane et al., 34 Fed. Rep. 46; Grand Rapids School Furniture Co. v. The Haney School Furniture Co. et al., 92 Mich. 558; White v. Mellin, 64 L. J. Rep. (N. S.), 308; Bell & Company v. The Singer Mfg. Co., 65 Ga. 452; Collard v. Marshall, Vol. 1, Law Reports, 1892 (Chan. Div.) 571; Thorley's Food for Cattle Company v. Massam, 41 Law T. Rep. (N. S.), 543; J. W. Thorley Cattle Food Company v. Massam, 42 Law T. Rep. (N. S.) 851.

MR. JUSTICE HORTON delivered the opinion of the court.

January 16, 1899, a bill in chancery was filed in the Superior Court by appellees, praying for an injunction restraining appellants from issuing and sending out the circular hereinafter quoted. January 17, 1899, the Superior Court entered an order granting a temporary injunction restraining appellants from "issuing, circulating, uttering and distributing" said circular. Said bill states that said circular is in the words and figures following, to wit:

“ORIGINAL
TRADE (ALLEGRETTI) MARK.
FRAUDS AND PIRATES.

The Supreme Court, in an opinion just handed down (December 21st), affirming the decisions of the Superior and Appellate Courts, holds that B. F. Rubel, I. A. Rubel and Giacomo Allegretti, who compose the firm known as 'Alle-

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gretti & Rubel' are guilty of fraud and deception in pirating our business.

The Supreme Court, in its opinion, said :

'From a careful examination of the whole record we think the chancellor below and the Appellate Court were amply justified in their finding.'

The Appellate Court said, which is affirmed by the Supreme Court, as above :

'The similarity shown by this record is so great as to compel the conclusion that it could only exist as the result of design and intent.'

In speaking of Giacomo Allegretti, Rubel's stool pigeon said :

'Only seven days after he left the employ of Allegretti Brothers (our predecessors), he advertised in the public press that he was the originator and sole possessor of the genuine process for manufacturing Allegretti chocolate creams. It would be idle to argue that this was not calculated and intended to deceive.'

The Supreme Court winds up its decision by saying :

'Fraud and deception having been practiced by appellants, as shown by the facts and findings herein, we are satisfied the decree of the court is not too far reaching.'

As found by three courts, and the highest in the State, B. F. Rubel, I. A. Rubel and Giacomo Allegretti are pirates and frauds, who have endeavored to steal our business and to trade upon our good name by imitating our business in every way.

We warn all people who care for honesty, against dealing with them.

Yours respectfully,
ALLEGRETTI CHOCOLATE CREAM COMPANY,
159 State St., Chicago.

927 Broadway, New York."

It is not necessary to recite at length the facts out of which the litigation between these parties has arisen. This court is familiar with them. In the main they will be found in Allegretti et al. v. The Allegretti Chocolate Cream Co., 177 Ill. 129, and Rubel et al. v. same, 76 Ill. App. 581.

In the bill in the case at bar it is stated that appellants changed their firm name July 18, 1898, from Allegretti & Co. to Allegretti & Rubel, and use the individual names of appellants as directed by the decree which was affirmed in

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177 Ill. 129. There is now no question before this court as to whether appellees are now conducting their business in such manner as that appellants have no ground of complaint. Neither is the question now presented, as to whether the circular set out in this bill of complaint is in law libelous. But we are called upon to decide whether a court of equity will entertain jurisdiction and enjoin the distribution of that circular.

The statement in said circular as to what has been decided by the courts, and the quotations from the opinions of the Supreme Court and this court, are substantially correct. It contains no threat, no attempt to intimidate. Outside of statements as to what it is there claimed the courts had decided, and of said quotations, there is but one assertion, viz.: "We warn all people who care for honesty against dealing with them" (appellees). It is not for us now to express an opinion as to whether this circular is libelous, so that a suit at law may be maintained to recover damages for its circulation.

It can not be said that the cases bearing upon this question are in entire accord. A careful examination of them will, however, dispel most of the apparent conflicts. The case of Kidd v. Horry, 28 Fed. Rep. 773, is very similar to the case at bar. That case was in the Eastern District of Pennsylvania. The opinion is by the late Mr. Justice Bradley of the Supreme Court of the United States, and was handed down October 9, 1886. The application in that case is stated by Mr. Justice Bradley as follows (p. 774):

"We are asked to grant an injunction in this case to restrain the defendants from publishing certain circular letters which are alleged to be libels and injurious to patent rights and business of the complainants, and from making or uttering libelous or slanderous statements, written or oral, of or concerning the business of complainants, or concerning the validity of their letters patent, or of their title thereto, pending the trial and adjudication of the principal suit which is brought to restrain the infringement of said patent. The application seems to be altogether a novel one, and is urged principally upon a line of recent English authorities, such as Dixon v. Holden, L. R., 7 Eq. 488;

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Thorley's Cattle Food Co. v. Massan, 14 Ch. Div. 763; Thomas v. Williams, Id. 864, and Loog v. Bean, 26 Ch. Div. 306. An examination of these and other cases relied on convinces us that they depend on certain peculiar acts of Parliament of Great Britain, and not on the general principle of equity jurisprudence."

After discussing several English acts and cases, the court proceeds thus (p. 775):

"But neither the statute law of this country nor any well considered judgment of the courts has introduced this new branch of equity into our jurisprudence. There may be a case or two looking that way, but none that we deem of sufficient authority to justify us in assuming this jurisdiction. The authority of the Supreme Court of Massachusetts in the cases of Boston Dietite Co. v. Florence Mfg. Co., 114 Mass. 69, and Whitehead v. Kitson, 119 Mass. 484, is flatly against it. So also are the New York cases of N. Y. Juvenile, etc., Society v. Roosevelt, 7 Daly, 188; Brandreth v. Lance, 8 Paige, 24; Mayer v. Dick, 55 How. Pr. 132; also the Georgia case of Caswell v. Central R. Co., 50 Ga. 70, and the Missouri case of Life Ass'n of America v. Boogher, 3 Mo. App. 173. We do not regard the contrary decision in Croft v. Richardson, 59 How. Pr. 356, as of sufficient authority to counteract these cases or disturb what we consider to be the well established law on the subject. That law clearly is that the court of chancery will not interfere by injunction to restrain the publication of a libel, as was distinctly laid down by Lord Chancellor Cairns in the case of Prudential Assur. Co. v. Knott, 10 Ch. App. 142, where he says in reference to the application for an injunction to restrain a libel calculated to injure property: 'Not merely is there no authority for this application, but the books afford repeated instances of the refusal to exercise jurisdiction;' and then refers to several authorities. If this decision has since been overruled, it is only because of the enlarged jurisdiction conferred upon the English courts by the statutes referred to, and is a standing authority as to the general law, independent of legislation. We do not think that the existence of malice in publishing a libel or uttering slanderous words can make any difference in the jurisdiction of the court. Malice is charged in almost every case of libel, and no cases of authority can be found, we think, independent of statute, in which the power to issue an injunction to restrain a libel or slanderous words, has ever been maintained, whether malice was charged or not. Charges

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of slander are peculiarly adapted to and require trial by jury; and exercising as we do, authority under a system of government and law, which by a fundamental article secures the right of trial by jury in all cases at the common law, and which by express statute declares that suits in equity shall not be sustained in any case where a plain, adequate and complete remedy may be had at law, as has always heretofore been considered the case in cases of libel and slander, we do not think that we would be justified in extending the remedy of injunction to such cases. The application for an injunction must be denied, and the ancillary bill is dismissed with costs."

In Raymond v. Russell, 143 Mass. 295, a bill in chancery was filed to restrain the proprietors of a mercantile agency from publishing the name and business standing of the complainant. There was no charge that the representations were false, but the court states the rule in these words:

"It is not within the jurisdiction of a court of equity to restrain, by injunction, representations as to the character and standing of the plaintiff, or as to his property, although such representations may be false, if there is no breach of trust or of contract involved."

Appellees quote at length from and rely largely upon the case of Emack v. Kane, 34 Fed. Rep. 46. That was a case in chancery wherein it was sought, as in the case at bar, to restrain the distribution of a circular. The court there held that a court of chancery would entertain jurisdiction, and issued an injunction. But the circular complained of in that case was very different from the circular now before this court. Judge Blodgett in his opinion in that case uses this language (p. 50):

"The *gravamen* of this case is the attempted intimidation by defendants of complainant's customers by threatening them with suits which defendants did not intend to prosecute; and this feature was not involved in Kidd v. Horry."

Neither is that feature involved in the case at bar. Here there is no threat or attempted intimidation. In most, if not all of this class of cases, where a court of chancery has entertained jurisdiction, the *gravamen* has been, as stated by Judge Blodgett, different from that of the case of Kidd v. Horry.

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The case of Everett Piano Co. et al. v. Bent, 60 Ill. App. 373, is in the question involved, very similar to the case at bar. In some respects the circular involved in that case was stronger against the party who issued it, than the one now before this court. It was there held that a court of chancery would not entertain jurisdiction. Mr. Justice Waterman, speaking for the court, said (p. 377):

“That a court of equity can not, under its common law powers, by injunction restrain the publication of a mere libel, seems to be most in accordance with the authorities in this country, as well as in England. Boston Dietite Co. v. Florence Mfg. Co., 114 Mass. 69; High on Injunctions, Sections 1015–1093.”

We fully concur in the statement that the rule as expressed by Mr. Justice Waterman is in accord with the authorities in this country, and also with the authorities in England prior to and when not controlled by the Judicature Act of 1873.

The circular complained of in the case at bar is not more or greater than a “mere libel.” (As to whether it is a libel we express no opinion.)

It follows from what we have said and the cases cited, that we are of opinion that a court of chancery has no jurisdiction to enjoin the distribution of the circular in question.

The judgment of the Superior Court is reversed and the cause remanded. That court will enter an order dissolving the preliminary injunction. Reversed and remanded.

William Webb v. Chicago City Ry. Co.

1. CONTRIBUTORY NEGLIGENCE—*Plaintiff Guilty of, Can Not Recover.*—Where the evidence shows that a plaintiff was guilty of negligence which contributed to his injury he can not recover.

2. SAME—*What is.*—A person influenced in his action by the call of some one on the street so that he stops and stands in the middle of a street car track immediately in front of an approaching train, is guilty of negligence contributing to his injury.

Trespass on the Case, for personal injuries. Trial in the Superior Court of Cook County; the Hon. JOSEPH E. GARY, Judge, presiding. Verdict and judgment for defendant by direction of the court: error by plaintiff. Heard in the Branch Appellate Court at the October term, 1898. Affirmed. Opinion filed July 11, 1899.

Statement.—This is an action of trespass on the case brought by plaintiff in error to recover damages for injuries, claimed to have been received the evening of the 7th of July, 1896, upon Wabash avenue, at a point near where Harmon court crosses or intersects said Wabash avenue, in the city of Chicago.

The declaration has three counts: The first count avers that plaintiff (1) was in the exercise of due care and caution for his own safety; (2) that there was no fault or negligence on his part; (3) that the defendant, by its servants, so carelessly and negligently managed its grip-car and train, that said grip-car "ran into" plaintiff and injured him.

The second count avers that defendant recklessly, wantonly and willfully ran said train of cars against the plaintiff.

The third count avers that defendant was negligent in failing to provide and equip the cars with fit and proper brakes, etc., whereby the train could be controlled.

Plea, not guilty; trial by jury. At the conclusion of plaintiff's case defendant moved the court to instruct the jury to find the defendant not guilty, which motion was sustained, and the jury thus instructed, and a verdict returned accordingly.

The plaintiff was seventy-two years old and had been blind twenty-five years. The accident occurred about eleven o'clock at night July 7, 1896, on Wabash avenue, Chicago, in the vicinity of Harmon court. Plaintiff says that he started to cross from the west to the east side of Wabash avenue. The testimony of all the other witnesses shows that in this he was mistaken. He started to cross from the east to the west side of Wabash avenue. He also states that when injured he was "right on the crossing" where Harmon court crosses Wabash avenue. In this he is undoubtedly mistaken. The other witnesses who saw this accident say

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that it occurred north of the Harmon court crossing; they varying in their statement from from sixty to two hundred feet.

Plaintiff's hearing was good. He says that he listened but heard no car coming on the south bound track. The grip-car which struck him was going south. He says that when he started to cross the street some man said to him, "It is all right, Uncle Billy;" that when he got to the middle of the street some other man hollered "Look out," and that then he stopped and partly turned "around," and was struck by the grip-car.

BLAISDELL & McCASKILL, attorneys for plaintiff in error.

WILLIAM J. HYNES and SAMUEL S. PAGE, attorneys for defendant in error.

MR. JUSTICE HORTON delivered the opinion of the court.

For the purposes of this case and in this opinion we shall assume that the employe of defendant in charge of the grip-car was guilty of negligence. There is no evidence to establish the averments in the second and third counts in the declaration which charge defendant with recklessly, wantonly and willfully running its train against the plaintiff, or with failing and neglecting to provide its cars with serviceable brakes, etc. Neither do plaintiff's attorneys in their brief and argument contend that the testimony establishes any liability under the averments in said second and third counts.

The question then is, did the testimony show that the plaintiff was guilty of negligence which contributed to the injury? The rule is now well settled in this State that if he was, he can not recover. At the April term, 1858, the Supreme Court of this State reversed this rule which had theretofore obtained and substituted the rule of comparative negligence. G. & C. U. R. R. Co. v. Jacobs, 20 Ill. 478. But at the November term, 1885, the Supreme Court announced the rule of contributory negligence as being the

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law of this State, and renounced the rule of comparative negligence. C. I. & S. Co. v. Martin, Admx., 115 Ill. 358. Since that case this rule has been repeatedly announced, and may now be considered as being the settled law of the State. L. S. & M. S. Ry. Co. v. Hessions, 150 Ill. 546, 556; N. C. S. R. R. Co. v. Eldridge, 151 Ill. 542, 549; Ch. City Ry. Co. v. Canevin, 72 Ill. App. 81, 84.

We are unable to escape the conviction that as regards the defendant the plaintiff was guilty of negligence which contributed to the injury. Plaintiff was not crossing the street at a regular street crossing. There was no car or vehicle upon the street in that immediate vicinity at the time of the accident except the grip-car which struck the plaintiff. Yet he says that he did not hear this car at all. Why? It is a matter of common knowledge that if a man possessing the sense of hearing tries to do so, he can hear a grip-car train a considerable distance. Plaintiff says that he could at that time hear street cars a long distance. It is a fact of general knowledge that where one faculty is impaired or destroyed, the other faculties become especially acute. For twenty-five years this unfortunate plaintiff had been deprived of his sense of sight. He had therefore been compelled to depend largely for his personal safety upon his sense of hearing. This accident was in the night time when there were but few vehicles upon the street. If he had paid attention, it must be that he would have heard the approaching train.

He may have been put off his guard by the call to him by some party unknown to the record in this case. He says he met that person near the street corner; that he walked about six feet further, when that person said to him, "Far enough; all right there, Billy; now go across; nothing coming, Uncle Billy." He probably was misled by this. If he was, and this caused him to be careless as to listening to hear the approaching train, defendant is not to be charged therewith. As a question of law it makes no difference what caused the plaintiff to be negligent or careless. It seems certain that the man who told plaintiff it was all right was careless. But that can not be imputed to defendant.

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The plaintiff started to cross the street after the unknown party told him it was all right. He says:

"I got about the middle of the street and somebody hollered from the opposite corner, 'Look out.' I stopped and partly turned around, partly turned sideways to listen to what he said, and I was struck by the car."

Upon cross-examination this question was asked:

"When he said 'Look out,' had you known that you were in the middle of the track?"

He answered:

"I knew I was in the middle and I turned off this way (indicating southwest), and I thought I was off far enough. I turned to listen to what he meant. I listened to hear if anything was coming and I didn't hear anything."

His sense of hearing at that time was good. He says he could hear street cars running a long distance.

Again the plaintiff was influenced in his actions by a call from some person on the street, so that he stopped and stood in the middle of the track, immediately in front of the approaching train. That was negligence which contributed to produce the injury.

. The defendant can not be held to be responsible for the advice of the two men who spoke or called to plaintiff. The acts of the plaintiff undoubtedly contributed to produce the injury. As to the defendant, those acts constitute negligence. Therefore, under the rule of law in this State, the plaintiff can not recover.

The judgment of the Superior Court is affirmed.

E. A. Batcheldor and Nellie Batcheldor v. George F. Jennings.

1. **GUARANTY—Effect of Surrender of Collateral Securities.**—A surrender by the holder of a note, of collateral security received from the principal, will not discharge the guarantor, if made with his knowledge and assent.

Assumpsit, against the guarantor on a promissory note. Trial in the Circuit Court of Cook County; the Hon. JOHN GIBBONS, Judge, presiding. Finding and judgment for plaintiff; error by defendant. Heard in the Branch Appellate Court at the October term, 1898. Affirmed. Opinion filed July 11, 1899.

E. F. GORTON and GEORGE W. BROWN, attorneys for plaintiffs in error, contended that any variation of original contract of the parties, if made without his consent, discharges the surety.

If the duties which the principal is to perform are varied by agreement between the principal and obligee after the surety for the conduct of the principal has become bound, such surety will thereby generally be discharged.

Any dealings between the principal and obligee amounting to a departure from the contract by which the surety is bound, and materially varying or enlarging his liabilities without his consent, will generally operate to discharge him. Ridgeway v. McCartney, 160 Ill. 129; 57 Ill. App. 453; People v. Seelye, 146 Ill. 189; Warner v. Campbell, 26 Ill. 282; Gardiner v. Harbach, 21 Ill. 129; Brandt, Suretyship & Guar. (2d Ed.), Secs. 397, 395, 393 (and collection of cases).

The undertaking of a guarantor is to be strictly construed in his favor. Barclay v. Warne, 143 Ill. 19; Rice v. J. A. Tohnau Co., 60 Ill. App. 516; Dupee v. Blake, 148 Ill. 453; People, use of, etc., v. Foster, 133 Ill. 496; Schreffler v. Nadelhoffer, Id. 536; Burlington Ins. Co. v. Johnson, 120 Ill. 622.

It is a defense for a surety at law that the creditor has wrongfully deprived the surety of recourse to collateral security held by the creditor, to which the surety had the right of subrogation. Hawkins v. Harding, 37 Ill. App. 564.

Where the payee of a note takes collateral security, he takes it as trustee, not for the maker alone, but also in trust for the guarantors on the note.

If such payee parts with or changes the nature of this trust fund, he releases the guarantors to the extent of the

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injury sustained by them. Phares v. Barber, 49 Ill. 370; Rogers v. School Trustees, 46 Ill. 428; Hall v. Hoxsey, 84 Ill. 616; Kaufman v. Loomis, 13 Ill. App. 124; Kirkpatrick v. Howk, 80 Ill. 122; Monmouth Nat'l Bank v. Whitman, 66 Ill. 331.

JAMES C. McSHANE, attorney for defendant in error.

The most important consideration as to the pledgee's duty in relation to collateral security is that perfect good faith should be observed by him in his dealings therewith. If he acts in good faith the pledgor can not complain. Only in cases of fraud or gross negligence on the part of the pledgee can he be held to a stricter account. Colebrooke on Collateral Securities, Sections 114, 115; Black River Bank v. Page, 44 N. Y. 453; Wells v. Wells, 53 Vt. 1; Brandt on Suretyship and Guaranty, Secs. 384, 390, 392.

A person with whom a note or anything else is pledged is in respect to the same a trustee bound to respond and account for the same as a trustee, and liable to be charged for neglect or misconduct like any other trustee. The pledgee of a promissory note is held to the exercise in respect to the same of such diligence as a prudent man would exercise in respect to his own affairs. Colebrooke on Collateral Securities, Secs. 114, 115; Union National Bank v. Post, 64 Ill. App. 409.

Taking a note as collateral security to another note, upon which there is an absolute guaranty, as transferring the collateral note, the original all the time remaining in the hands of the payee, does not release the guarantor. Penny v. Crane Bros. Mfg. Co., 80 Ill. 244.

MR. JUSTICE SHEPARD delivered the opinion of the court.

The Lexington Hotel Building Company, a corporation, made its promissory note for \$6,000, payable to the order of Jennings, the defendant in error, seventy days after date, and the Bacheldors, the plaintiffs in error, at the same time guaranteed the payment thereof at maturity by

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their guaranty in writing indorsed on the back thereof, and being so made and guaranteed, the note was delivered to Jennings. The note was given for a loan of money to the company. This suit was brought by Jennings against the guarantors upon their said contract of guaranty.

A jury was waived and the cause was submitted to the court, who gave judgment for Jennings.

The defense was made under a verified plea of the general issue. The evidence in support of the defense shows that at the time Jennings took the note, and as a part of the same transaction, the maker of the note, the building company, delivered to Jennings six thousand dollars' worth, at their face value, of second mortgage bonds made by the building company, as collateral security for the payment of the note, and that subsequently he, Jennings, gave up the bonds so held by him, and took in substitution therefor an equal amount of other bonds issued by the building company. Said bonds so substituted were a part of a series of bonds issued for the purpose of retiring the series of bonds of which those forming the original collateral were a part, and were for a hundred thousand dollars greater amount, and matured at a much later period of time.

The plaintiff in error, E. A. Bacheldor, is the husband of Nellie Bacheldor, and was president of the building company and the active manager of its affairs. He transacted all the business with Jennings, and participated in the exchange of collaterals, and it is not claimed that he was released by reason of the change in or substitution of the collateral security. Nellie Bacheldor knew that the old bonds had been retired and the new ones issued, but did not have actual knowledge of the particular transaction with defendant in error in which he gave up the original and accepted the new bonds as collateral security, and the claim is that she is released from her contract of guaranty because of such transaction.

It appears by modifications made by the trial judge in certain propositions of law submitted to him in behalf of the Bacheldors that he, by necessary intendment, found from

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the evidence that E. A. Bacheldor acted as the authorized agent of Nellie Bacheldor in the entire matter, and therefrom drew the conclusion of law that she was chargeable with knowledge of all that was done by him while so acting for her.

If the proved facts and circumstances fairly warrant the finding that such relationship of agency existed, the conclusion of law reached is certain to follow, for there is no doubt but that Mr. Bacheldor knew of and took part in every transaction with Jennings in respect to the matters in question.

E. A. Bacheldor was the president and active manager of the corporation that made the note. The note is executed in the name of the corporation by him as its president. It does not appear where or when the guaranty was signed by either himself or his wife, except that it was done before the note was delivered. He had the note in his possession in the office of one Jenkins, where it and the bonds were delivered by him to Jennings, and Mrs. Bacheldor was not present. He must therefore be held to have been the agent of Mrs. Bacheldor for the delivery of the note, and in respect to the transaction in which it was delivered. Such is the unmistakable inference, and that being so, Mrs. Bacheldor is bound with the knowledge he, as her agent, had, that Jennings accepted the note and the collateral bonds.

She subsequently knew personally that Jennings continued to hold the note, for after a receiver of the building company, maker of the note, was appointed in some other suit, she told Jennings she would see that the note "was fixed up and settled," and that he should "never lose a cent on it."

She also knew of the new issue of new bonds to take the place of the original ones, and of the retirement of the latter. It is difficult to understand how she could have known of the new issue and its object, and that the old bonds were retired by the new ones, without knowing that there had been an exchange made with Jennings. The inference is strong that she did know it.

The admission at the trial that if examined she would testify "she knew nothing about the exchange of collateral," ought not, in the face of the other evidence and circumstances, to stand as meaning anything more than that she did not know anything about the actual occurrence of the exchange. Mr. Bacheldor conducted that exchange of bonds and saw personally to the cancellation of the original ones. The only evidence tending to show that Mr. Bacheldor's relationship of agent for Mrs. Bacheldor with reference to the subject-matter of the note, which existed when he delivered the note guaranteed by her, terminated with that particular transaction, is his testimony that she "always acted for herself in everything that required her to act."

Besides such original agency the trial judge had before him the evidence of Mrs. Bacheldor's knowledge of the issuance of the new and the retirement of the old bonds and her knowledge that the note remained unpaid in Jennings' hands at the time the new bonds were issued. Taking all the positive evidence into consideration, and the surrounding circumstances, with the legitimate inferences to be drawn from both, and having in mind settled rules concerning the weight that the findings of fact made by a trial court upon evidence adduced at the trial, are entitled to by a reviewing tribunal, we ought not in this case to hold that the facts of agency by Mr. Bacheldor and of knowledge and assent by Mrs. Bacheldor, which by necessary intendment were found to exist by the trial court, were without sufficient evidence to support them. And such is our duty, notwithstanding we might hold otherwise if this were an original hearing.

We concur with appellants in their contentions concerning the effect upon a contract of guaranty or suretyship in case of a change in collaterals deposited with the holder by the maker of a promissory note, made between the maker and the holder of the note without the knowledge or assent of the guarantor or surety, but when such knowledge or assent appears the whole contention falls.

Some argument is expended upon the point that Jennings extended the time for the payment of the note and thereby

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the guarantors were released. It is enough to say upon that question, that the evidence wholly fails to show that any valid and binding extension was ever made.

The point is made that the judgment is in excess of the amount of principal and unpaid interest on the note, and it would so appear, but not to the extent claimed.

Recognizing error in that regard, the defendant in error has voluntarily entered a remittitur in this court of \$435, from the judgment of \$6,900 that was rendered by the Circuit Court, and has thereby confessed error to such extent.

An examination of the evidence shows that such remittitur is sufficient to cure the excess for which judgment was rendered, and the order is that the judgment of the Circuit Court be affirmed for the balance of \$6,465, but at the costs of defendant in error.

Affirmed for amount remitted down to.

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William D. Boyce v. Godfrey A. Tallerman.

1. **NOTICE—To Owner, of Defects in Chimney, Not Necessary.**—Where a person is injured by the falling of a defective smoke-stack, erected under and in pursuance of a contract with the owner, the owner's liability in no way depends upon a notice to him of the insecurity of said stack.

2. **DAMAGES—When Not Excessive.**—Where the damages awarded are more than the court would have been inclined to give, but are not manifestly against the weight of the evidence, it will not be justified in reversing the judgment.

Action for Personal Injuries.—Trial in the Superior Court of Cook County; the Hon. JOHN BARTON PAYNE, Judge, presiding. Verdict and judgment for plaintiff; appeal by defendant. Heard in the Branch Appellate Court at the October term, 1898. Affirmed. Opinion filed July 11, 1899.

Statement.—This action was brought in the court below, by Godfrey A. Tallerman, appellee, against the University Club, a corporation, the National Electric Construction

Company, a corporation, and the appellant, William D. Boyce. The National Electric Construction Company became insolvent, or went out of existence, prior to the time of the trial of this cause, and the case, as to it, was dismissed by plaintiff.

At the conclusion of the evidence for plaintiff the case was also dismissed as to the University Club, and prosecuted as to Wm. D. Boyce only, who, appellee alleges, is liable, together with the other two defendants named, for causing injury to the person of appellee.

The facts of the case are substantially as follows:

On the 20th day of November, A.D. 1894, at about 10 A.M., appellee, while engaged in his regular duties in the abstract office of Handy & Co., at 94 Washington street, Chicago, was struck on the head, back and hand, by pieces of glass falling from the sky-light, about eighteen feet above his head. These pieces of glass were knocked from the sky-light by a section of a smoke-stack which had fallen, or been blown down upon the sky-light. This smoke-stack, from which the section above referred to fell, was built at the rear of the adjacent buildings known as Nos. 112, 114, 116, 118, Dearborn street. What is known as the Boyce building comprises 112, 114. What is known as the University Club building comprises 116, 118.

The fee of the ground upon which the Boyce building stands is owned by Julia Sherman. The fee of the ground upon which the University Club stands, belongs to the Story estate. The two buildings are owned by Wm. D. Boyce and the University Club, respectively.

The smoke-stack in question is erected upon the dividing line between these two pieces of property; one-half of its base, the northern half, rests upon the property of Julia Sherman; the other half of its base rests upon the property belonging to the Story estate.

The stack extended upward to a height of about 158 feet. From its base to the top of the University Club building, which is eight stories in height, the stack stands in a niche between the two buildings, so that on its north, and one-

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half of its east side, it is encased by the brick wall of the Boyce building; while on its south, and one-half of its east side, it is encased by the brick wall of the University Club building. Its west side is on the western line of this property, and is exposed. The stack was attached to the University Club building as far as that building went, and for the remainder of its height it was attached to the Boyce building, which is four stories higher than the University Club building. The nature and position of the fastenings which bound the stack to the Boyce building above the University Club building, are described by one of the plaintiff's witnesses as follows:

"There was a fastening at the top of the University Club building, which was about forty feet, I should judge, below the top of the Boyce building. Then there was one steel band about two inches wide, and, I should judge, it was about one-eighth of an inch thick about half way up. That would be about twenty feet from the roof of the University Club building. Then, at the top, there were three chains; I don't know what number they did call them, but they were good heavy chains, fastened to the exhaust pipe up there."

The University Club had leases of all of the ground upon which this stack stood; the southern half of which it leased from the Story estate for a term of ninety-nine years; the northern half of which it leased from Wm. D. Boyce, the appellant, who transferred to it all his rights obtained under a ninety-nine year lease from Julia Sherman. By the term of this lease from Wm. D. Boyce to the University Club, that club was to hold this small piece of ground for all the remainder of the ninety-nine years for which Boyce had originally leased it. So that this property would at the expiration of the University Club's lease revert directly back to Julia Sherman.

All of these leases referred to were made before the erection of the smoke-stack in question, and before the erection of the Boyce building. The smoke-stack was erected to the height of the University Club building before the Boyce building was erected.

The horizontal dimensions of the stack were about three feet by five feet, giving a capacity of flue equal to 2,160 square inches.

By the conditions of the lease from Boyce to the University Club of the northern half of the ground upon which the stack stood, Mr. Boyce reserved the right to use a part of this smoke-stack as a smoke flue for his building, to the extent of a 150 horse-power flue, whenever he should erect a building on the adjacent premises, upon which he afterward did erect the Boyce building.

The National Electric Construction Company was a corporation engaged in the business of generating heat, light and power, and furnishing the same for a consideration to the neighboring buildings.

Before the erection of this smoke-stack the Electric company agreed with the University Club to rent the basement of its building (the University Club) and carry on its business therein, but in order to do so it was necessary that a stack of such dimensions as the one in question should be erected, the business of said Electric company requiring a flue capacity for about 375 horse-power engines, or about 1,280 square inches flue capacity.

As a part consideration for its right to occupy the basement of the University Club the National Electric Company agreed to, and did, erect the smoke-stack in question up to the height of the University Club building, fastening the stack to that building, and subsequently, and at the time of the erection of the Boyce building, the Electric company, acting under its agreement with Boyce, increased the height of the stack to the height of the Boyce building, fastening this upper portion of the stack to the Boyce building. This piece of work was done while the building was in the hands of Mr. Clark, the construction contractor, who erected it for Mr. Boyce.

After the stack had been thus erected, and after the erection of the Boyce building, but before the happening of the injury complained of, Mr. Boyce took possession of the Boyce building, and began making use of his flue privilege

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in the stack in question, and was doing so at the time of the said injury.

The Electric company was occupying the basement of the University Club building and was also using this smoke-stack at the time of the said injury.

Appellant admits that appellee was injured (but as to the extent and consequence of this injury no admission is made), and admits that appellee was without fault in the premises.

JOHN A. POST and O. W. DYNES, attorneys for appellant.

EDWARD B. BURLING, attorney for appellee.

MR. JUSTICE HORTON delivered the opinion of the court.

That appellee was injured by the falling of a portion of the smoke-stack referred to in the statement, is conceded. Appellant contends, however, that he is not the person who is liable to appellee for the damages arising from such injury.

By an agreement between appellant and the University Club, appellant leased to said club a part of the land upon which said smoke-stack was erected. The following provisions, with others, are contained in said agreement, viz.:

“Second: In consideration of the demise and lease aforesaid, the party of the second part (The University Club) covenants and agrees to and with the party of the first part (Boyce) that it will, within the space of three (3) months next after the date of this agreement, place and erect, or cause to be placed and erected, partly upon the land hereby demised, a wrought iron stack, of at least one hundred and fifty (150) horse-power capacity.

“The party of the second part further covenants and agrees to and with the party of the first part that he may at any time after such stack shall have been erected, and during the term of his demise, insert into said stack and use for his own purposes, until the end of the term hereby demised, a flue of one hundred and fifty (150) horse-power capacity.

“The party of the second party further covenants and agrees that the party of the first part shall at all times have the benefit of so much of the draft of said stack as will enable him fully to use and enjoy his one hundred and fifty (150) horse-power flue aforesaid.

"It is understood by the parties hereto that all repairs and renewals of said stack are to be made by the National Electric Construction Company during the term of a ten-year lease which the party of the second part has made of its basement to said company. But it is covenanted and agreed by the parties hereto that after the lease to said National Electric Construction Company shall have expired, and before it shall have expired, if such construction company shall fail or go out of business, all repairs and renewals shall be made at the joint expense of the parties hereto; said parties shall pay, respectively, portions of the expense of any such repairs or renewals, proportioned to the number of horse-power capacity in said stack actually used by them respectively, at the time such repairs or renewals become necessary.

"The party of the first part (Boyce) covenants and agrees to carry up said stack at his own expense to the height of any building which he may hereafter erect upon his said premises."

By its certain agreement of even date with said agreement between appellant and said club, said Electric company agreed with appellant, the consideration therefor moving from appellant, "to extend said stack upward at its own expense so that the same shall at all times so long as said company shall remain a tenant of said club, be of at least equal height with any building hereafter erected upon the premises of said Boyce, adjoining said stack, provided, however, that if any such building hereafter erected upon the premises of said Boyce shall exceed one hundred and sixty (160) feet in height, the cost of so much of said stack as shall exceed one hundred and sixty (160) feet in height shall be borne and paid by said Boyce."

Appellant testifies that he did not build said smoke-stack or have anything to do with building it, or furnish material therefor or pay for it, and that he did not know who erected it. This may be entirely correct in the connection and in the sense in which appellant used and intended it, but it is not true in a legal sense under the contracts from which the above quotations are taken. The University Club caused the stack to be erected to the height of its building, by the Electric company. Appellant contracted and agreed

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with the University Club to carry up said stack at his own expense to the height of any building which he might thereafter erect upon his said premises. He also made a contract with the Electric company whereby that company agreed to extend said stack to the height of any building thereafter erected upon the premises of appellant adjoining said stack, at its own expense.

After said agreements were made appellant erected a building upon his said premises which was about forty feet higher than the Club building. While the appellant's building was still in the hands of his contractor the Electric company extended said stack up to the height of the Boyce building. Upon the record in this case it must be assumed that the Electric company so extended said stack under its contract with appellant. The appellant used and enjoyed the benefit of said stack with his building, to the extent of a certain portion or per cent of the capacity thereof, all the time after erecting his building, and was so using and enjoying the same at the time appellee was injured by the falling thereof. Appellant is, in law, liable to outside parties for any damages arising from a faulty or defective construction of such extension of said stack. As between appellant and appellee it is immaterial whether the Electric company is or is not also liable, or whether the Electric company is liable over to appellant for any sum it may be compelled to pay on account of the defective construction or fastening of said stack.

From the testimony it seems that a part of the stack fell because that part comprising the extension above the Club building was not properly secured or fastened. For the injury thereby caused to appellee the appellant is liable. Said stack having been erected under and in pursuance of a contract with appellant, his liability in no way depends upon a notice to him of the insecurity of said stack, or upon a demand to abate the nuisance, as urged by his counsel.

Whether the declaration is good and sufficient as against a demurrer is now immaterial. There is no defect in it which is not cured by verdict.

It is also contended that the damages are excessive. It may be that the damages awarded by the jury are more than we should have been inclined to give, but the jury and the trial judge saw appellee and heard his testimony, and saw the other witnesses and heard their testimony. The verdict and judgment are not so excessive or so manifestly against the weight of evidence that this court would be justified in reversing the judgment.

The judgment of the Superior Court is affirmed.

E. Gauggel (sued as E. Fox) and Rudy Henry, Co-partners as Fox & Henry, v. Mrs. J. H. Ainley.

1. FIXTURES—Where New Lease is Taken Without Reserving Right of Tenant to Fixtures Erected Under Former Lease.—At the expiration of a lease during which trade fixtures had been erected by the tenant, and a new lease taken of the same premises, containing no reservation of any right or claim of the tenant to the fixtures still remaining on the premises, and without recognizing the right of the tenant to remove them, such fixtures erected under the former lease can not be removed by the tenant during or at the end of the new lease, notwithstanding his actual possession of the premises has been continuous.

Appeal from a Decree Making Permanent an Injunction entered by the Superior Court of Cook County; the Hon. THEODORE BRENTANO, Judge, presiding. Heard in this court at the October term, 1898. Affirmed. Opinion filed June 12, 1899.

JOHN M. DUFFY, attorney for appellants.

CUTTING, CASTLE & WILLIAMS, attorneys for appellee.

If a tenant accepts a new lease in which there is no reservation of the right to remove fixtures erected under a former lease, his right in the fixture is lost. *Sanitary District of Chicago v. Cook*, 169 Ill. 184; *Watriss v. Bank*, 124 Mass. 571; *Hedderick v. Smith*, 103 Ind. 203; *Merritt v. Judd*, 14 Cal. 59; *Carlin v. Ritter*, 68 Md. 478; *Taylor on Landlord and Tenant*, Sec. 552; *Tiedeman on Real Estate*, Sec. 7;

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Ewell on Fixtures, 174, 175; Wood on Landlord and Tenant, Sec. 532.

MR. JUSTICE ADAMS delivered the opinion of the court.

Mrs. J. H. Ainley, the appellee, filed a bill against the appellants, Edwin Gauggel (sued as E. Fox) and Rudy Henry, partners under the firm name of Fox & Henry, to enjoin them from removing from certain premises which they had been occupying as appellee's tenants, a baker's oven and a certain wooden structure. Appellants answered the bill and a replication was filed. By agreement of the parties, the cause was heard on the pleadings, affidavits filed in support thereof, and evidence produced in open court. The court, having, by agreement of and at the request of the parties, visited and examined the premises prior to the hearing, found that the allegations of the bill are true; that appellants, by written lease of date April 26, 1898, leased the premises described in the bill, namely, the first floor of number 137 North Park Avenue, with rooms attached in rear of same, and rooms in rear of store number 139 North Park Avenue, situated in Austin, Cook county, Illinois; that, at the time of said leasing, an oven was erected on said premises, and was then and is now firmly attached to said premises, so as to form a part thereof, and in such manner as to render it impossible to remove the same without substantial injury to the premises; that said oven had been so erected on the premises for several years prior to the date of said leasing, and no reservation of the same was made by appellants in said lease, and that appellants were threatening to remove the same, etc.

On the filing of the bill a preliminary injunction was granted, restraining appellants from removing from the premises the oven and a certain building adjacent to or surrounding it, and attached to the premises. The ordering part of the decree made the preliminary injunction perpetual. It appears from the record that March 14, 1893, Joseph H. Ainley, by written indenture of that date, leased to E. Fox & Son the premises in question, for a term

from May 1, 1893, until April 30, 1894, and that E. Fox & Son during said term erected the oven and wooden structure in question; that after such erection, and during the term created by the lease to E. Fox & Son, appellants, apparently by consent of the parties, were substituted for E. Fox & Son as tenants of the premises under the lease, and assumed the obligation of lessees thereunder, and occupied the premises for the remainder of the term; and thereafter, on May 26, 1898, appellee, who in the meantime seems to have become the owner of the premises, leased them to appellants, by written lease of the last mentioned date, for a term commencing May 1, 1898, and ending April 30, 1899. This lease was in duplicate; and one part was signed by Mrs. J. H. Ainley, by C. S. Castle, agent, and the other part by appellants. At the time appellants became tenants under the lease to E. Fox & Son, they purchased from E. Fox & Son the oven and wooden structure, and they were on the premises at the date of the execution by appellee of the lease to appellants. The lease to appellants contains the following stipulations by appellants:

"That they have examined and know the condition of said premises, and have received the same in good order and repair, * * * and that they will keep said premises in good repair * * * and will keep said premises and appurtenances * * * in a clean and healthy condition, * * * and upon the termination of this lease, in any way, will yield up said premises to the said party of the first part in good condition and repair, loss by fire and ordinary wear excepted, * * * and will not permit any alteration of or upon any part of said demised premises, nor allow any signs or placards posted thereon, except by written consent of the first party; all alterations and additions to said premises shall remain for the benefit of the lessor, unless otherwise provided in said consent as aforesaid."

The former lease to E. Fox & Son was on the same form and contained the same printed provisions. The lease to appellants contains no reservation to them of the oven, or wooden structure, or any fixtures, and counsel for appellants admit, in their argument, that the lease to E. Fox & Son contained no reservation of any fixtures.

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Appellants, claiming that appellee had violated the lease, were about to abandon the premises and remove therefrom the oven and wooden structure surrounding and covering it, when appellee, by Castle, her agent, forbade them so to do.

The answer of appellants alleges, in substance, that they were engaged in the bakery and dining room business, and used the oven in their business.

Earle, appellee's witness, describes the oven and wooden structure, and the manner in which they are connected with appellee's main building, as follows:

"Said oven is built of brick and iron, in the rear, about five feet from alley at the rear of main store room, which has brick wall; that foundation of oven consists of posts driven in the ground, on which rest heavy wooden sills, on which are joists, then a brick structure about twelve by sixteen feet, the same dimensions as foundations; the whole is covered by a wooden shed, the roof of which slants west, extending from the rear wall of said store, and is attached thereto by tin sheets nailed and extending under wooden shingles; that said brick structure is built up against the rear wall of the store building; the rear wall thereof constitutes the east side of the oven, and through the rear wall of said oven there are five openings into the oven, viz.: one to each furnace, to oven, for peep hole, for hot water pipe, extending into store room, and for damper; that all openings except chimney are through the rear wall of said store-room. The furnace has long iron bars on grates extending from the said opening in said rear wall backwards and firmly connected, and that the sills rest on and are nailed to said posts; that wooden braces are nailed at one end to said posts and at the other to sills; the brick structure is connected with rear wall of said store-room by mortar, and connections are made at openings so as to form one continuous structure; that the east wall of oven is rear wall of store-room; that adjoining oven on the south is a frame shed which extends to the south line extended of store-room; adjoining said oven on the north is a frame structure, roof of which extends up to and is connected with building, and along the south side is attached to roof of said oven; the truss holding up same is nailed to one of the braces of said oven; that oven is also braced by iron rods extending from the rear of brick structure entirely through the same, and the rear wall of store-room."

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Tyler, witness for appellants, says that Earle's statement of facts, dimensions, etc., is, in the main, correct, but says that the peep hole is only six by eight inches, and hot water pipe hole six by six inches, and the damper hole one-half by one-half inch in dimension. Gauggel, one of the appellants, says:

"There are three small openings not exceeding eighteen by thirty-six inches in said main wall, to reach oven from interior of said building."

The oven and wooden structure having been erected on the premises before the lease to appellants was executed, and being there at the time the lease was executed, even assuming they were trade fixtures, and the lease containing no reservation of the right of appellants to remove them, appellants have not the right to remove them.

We regard the law on the subject as settled by the decision of the court in Sanitary District v. Cook, 169 Ill. 184. In that case the court say:

"But the great weight of authority seems to be that where, at the expiration of a lease during which trade fixtures have been created on the premises by the tenant, a new lease is taken of the same premises, containing no reservation of any right or claim of the tenant to the fixtures still remaining on the premises, and without recognizing the right of the tenant to remove them, such fixtures erected under the former lease can not be removed by the tenant during or at the end of the new lease, notwithstanding his actual possession of the premises has been continuous." Citing numerous authorities.

Counsel for appellants seek to distinguish the case cited from the present, but we can perceive no distinction in principle.

Counsel urge that Castle, appellee's agent, recognized that appellants owned the fixtures by offering to purchase them; but Castle testified that all offers made by him to appellants to pay anything for the oven, were made merely as offers of compromise, and for the sole purpose of avoiding the expense and trouble of litigation, and that appellants were so informed and so understood. It does not appear from

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the record that Castle was appellee's agent for any purpose except the leasing of the premises, and perhaps collecting the rent, and such agency would not authorize him to permit the removal of fixtures which were a part of the premises, in legal contemplation, or to divest appellee of the ownership of such fixtures by anything which he might say or do.

Whether the oven and its protecting wooden structure are so attached to appellee's building that they can not be disconnected therefrom without substantial damage to the building is a question of fact, and we can not say that the court's finding on that question is not sustained by the evidence, especially as the court, by request of the parties, viewed and examined the premises. In Springer v. City of Chicago, 135 Ill. 552, 561, the court say: "The premises, on view, may be regarded, as it is termed in the books, real evidence, and oral testimony in reference to the premises could not be as satisfactory in its character as the real evidence."

The decree will be affirmed.

Louisa Steingrabe, Intervenor, etc., v. French Mirror & Glass Beveling Co.

1. **EQUITABLE ASSIGNMENTS—*Requisites of.***—No particular form of words is necessary in order to constitute a valid assignment of a debt or other chose in action, in equity. Any words are sufficient which show an intention of transferring the chose in action to the assignee for a valuable consideration. Any order, writing, or act which makes an appropriation of a fund, amounts to an equitable assignment of the fund. The question in all cases of equitable assignments is what was intended by what was said and done by the parties.

2. **SECURITY—*For Debt—Rights of Holder.***—One holding security for a debt, is entitled, in the absence of an agreement to the contrary, to hold all the security until all the debt is paid.

3. **PAYMENT—*Burden of Proof.***—Payment is a fact to be proved by the party claiming the benefit of it.

Assumpsit.—Writ of attachment. Trial in the Superior Court of Cook County; the Hon. SAMUEL C. STOUGH, Judge, presiding. Verdict and

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judgment for plaintiff; appeal by defendant. Heard in the Branch Appellate Court at the October term, 1898. Reversed and remanded with directions. Opinion filed July 11, 1899.

FLOWER, SMITH & MUSGRAVE, attorneys for appellant.

To constitute a valid assignment of a debt or chose in action no particular form of words is necessary. Any order, writing or act which makes an appropriation of a fund amounts to an equitable assignment. An oral or written declaration may consequently be as effectual as the most formal instrument, and pass the rights to an obligation under seal or of record. Am. & Eng. Ency., Vol. 1, p. 835.

FERGUSON & GOODNOW, attorneys for appellee.

MR. JUSTICE SHEPARD delivered the opinion of the court.

The Joseph Knittel Show Case and Cabinet Works Company, an Illinois corporation located at Quincy, Illinois, gave what purported on its face to be a chattel mortgage dated July 8, 1896, to Louisa Steingrebe, the appellant, to secure the payment of its two promissory notes to her, aggregating eight thousand dollars.

By its terms the mortgage purported to "sell, assign and transfer" certain specified machinery, tools, implements, stock in trade and "all book accounts, all other material, fixtures and chattel property of every kind and description belonging to said company at their office at Third and Broadway at Quincy, Illinois," etc.

And it was provided that the company should "retain the ordinary use and possession of such property" until the notes were paid, subject, however, to the right of the mortgagee to take possession in the event of certain happenings, as is usually provided in cases of chattel mortgages containing like provisions for the possession of the property to remain with the mortgagor. The Knittel Company is not questioning the validity or effect of the writing as a mortgage or any purpose for which it may stand. The contest is wholly between creditors of that company.

On July 16, 1896, the appellee, a general creditor of the

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Knittel Company, sued out of the Superior Court of Cook County an attachment in aid of its assumpsit suit against said Knittel Company and garnisheed one Shinners of Chicago, a claimed debtor of the Knittel Company.

The appellant interpled and claimed that the money due from Shinners belonged to her and was not subject to attachment or garnishment for the debts of the Knittel Company, and the real issue is upon that interplea.

The Superior Court found that Shinners was indebted in the sum of \$596, denied the prayer of the interplea, and gave judgment against Shinners' garnishee, and in favor of the attachment by appellee.

We omit mention of some details that in the view we take are immaterial.

The substantial question is one of law, merely, upon facts that are not in dispute. Whether the chattel mortgage, as such, could properly cover book accounts, or whether it was valid or not in other respects, is wholly immaterial. For the purpose of this case it may be conceded that, considered as a mortgage merely, it was ineffectual as against the appellee.

As an assignment, or evidence of it, of the book account against Shinners it may only be considered.

Joseph Knittel, president of the Knittel Company, was the only witness who testified in the case. He testified, in substance, that the mortgage was given to secure a prior loan made by Mrs. Steingrebe, and was to cover the book accounts, which as they should be collected were to apply on the mortgage, on the amount borrowed; that notices of the assignment of the accounts were sent immediately to various debtors, including Shinners; that the books in which the accounts were kept remained in the possession of the Knittel Company, but that Mrs. Steingrebe, who was present when the mortgage was made, took possession of the mortgage itself; that the mortgage was the only writing that evidenced the assignment of the accounts, or under which they were attempted to be transferred to Mrs. Steingrebe, and that it was through that instrument alone that she received the book accounts.

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The transaction indicates a clear intention by the Knittel Company to pass all its beneficial interest in the accounts to Mrs. Steingrebe and by her to receive it, and that was all that was required. The written instrument, whether it be called a chattel mortgage or by some other name, is indisputable evidence of that intention. An oral assignment would have been equally effectual.

"Any order, writing or act which makes an appropriation of a fund, amounts to an equitable assignment of the fund." *Mason v. Chicago Title and Trust Co.*, 77 Ill. App. 19, and authorities there cited.

"In order to constitute a valid assignment of a debt or chose in action, in equity no particular form of words is necessary. Any words are sufficient which show an intention of transferring or appropriating the chose in action to the assignee for a valuable consideration." *Savage v. Gregg*, 150 Ill. 161.

The language used in the so-called mortgage is not, to be sure, artificially exact, but the question in all cases of equitable assignments is what was intended by what was said and done by the parties, and as to that intention and its effectuation, there can be no doubt from Knittel's testimony.

"Though the clause * * * was not in form an assignment * * * yet as it was treated and intended by the parties as a compliance with the agreement to assign * * * it must be held to have accomplished that purpose; and to be as binding on all persons as if in all respects legally formal." *Glover v. Wells*, 40 Ill. App. 350.

The only inquiry need be, was there an intention to assign on the one side and an assent to receive on the other, and was what was done an effectuation of such purpose. With that inquiry answered affirmatively, as in this case it must be,

"The doctrine is well settled that courts of law will notice and protect the interests of the equitable owners of choses in action, and particularly so in the matter of a garnishee proceeding, which is of an equitable character." *Savage v. Gregg*, 150 Ill. 161.

It was not necessary, as seems to be argued by appellee, that the interplea should have been filed for the use of the Knittel Company. Proceedings like interpleas of this char-

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acter are equitable in their character and should be, as this was, presented by the real party in interest.

The points that because other property than the accounts was transferred by the mortgagee the mortgagee must give credit on her debt for the value of that property, and only recover out of the funds in the hands of the garnishee the balance, and that she may have been paid in some way not appearing, in which event she could not dispute the garnishment, are without merit.

There is no presumption of law of the kind contended for with reference to either point. One holding security for a debt is entitled, in the absence of agreement to the contrary, to hold all the security until all the debt is paid. As to payment, that is a fact to be proved by the party claiming the benefit of it. Price v. German Exchange Bank, 60 Ill. App. 418.

And this last cited case decides also what there is some hint concerning in appellee's brief, that even though the garnishee had no notice of the assignment of the account before the garnishee writ was served upon him, the garnishment will not take precedence of the assignment.

We refrain from discussing any of the questions predicated upon rules of law applicable to chattel mortgages as such. Appellant makes no claim as mortgagee, and her rights in no manner depend upon the treatment of the writing as a mortgage.

She claims only as assignee, and the whole purpose served in this suit by the purported mortgage is to evidence and establish the assignment.

As assignee of the accounts, the appellant was clearly entitled to have judgment upon her interplea for all that was determined to be owing from Shinners. The judgment of the Superior Court is accordingly reversed, and the cause remanded to that court with directions to enter judgment in favor of appellant for the amount of \$596, found against Shinners, and deposited by him with the clerk of the court, and to direct the said clerk to pay the said amount to appellant. Reversed and remanded, with directions.

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Randall H. White v. Milo H. Wagar.

1. **SEARCH WARRANTS—Who May Issue.**—Any judge or justice of the peace may, upon complaint on oath, issue a search warrant when satisfied that there is reasonable cause.

2. **SAME—When They Will Not Issue.**—The constitutions of this State and of the United States provide that no such warrant shall issue without probable cause, supported by affidavit.

3. **SAME—Probable Cause, How Shown—Mere Belief Not Sufficient.**—The evidence must be of such facts as shall satisfy the magistrate that suspicion is well founded. The affidavit must show probable cause arising from facts within the knowledge of the affiant, and must exhibit the facts on which the belief is based; his mere belief is not sufficient.

4. **CONSTRUCTION OF STATUTES—Sections 115 and 116, Ch. 38, R. S., Not Repealed by Implication by Chap. 140, R. S.**—Sections 115 and 116 of chapter 38 apply to unregistered private stamps, labels or trademarks, while chapter 140 provides for the protection of those which it requires to be filed for record with the Secretary of State. It does not seem to cover the whole subject-matter of the former, and can not be held to repeal it by implication.

5. **SAME—Rule of Construction.**—It is a rule of construction that general words following an enumeration of special cases, apply only to things of the same character as those expressly mentioned.

6. **TRADE-MARKS—Counterfeit Trade-Marks Not Necessarily Forgery.**—A counterfeit trade-mark is not necessarily a forgery, though it may be where it contains a guaranty expressed or implied.

7. **CERTIORARI—When it Will Lie.**—The Circuit Court has power to award the writ of certiorari at common law to inferior tribunals, when it appears from the face of the record that the latter have exceeded their jurisdiction, or where they have proceeded illegally and no appeal or other mode of review is provided.

8. **SAME—Purpose of the Writ.**—The purpose of a writ of certiorari is to bring the proceedings of inferior tribunals before the court for review, where they have exceeded their jurisdictions, within which it is the proper province of the court to restrain them.

Certiorari.—Appeal from the Circuit Court of Cook County; the Hon. JOHN GIBBONS, Judge, presiding. Heard in this court at the October term, 1898. Affirmed. Opinion filed July 11, 1899.

RANDALL H. WHITE, attorney in his own behalf.

CHARLTON & COPELAND, attorneys for appellant, contended that a common law certiorari will issue only where

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there is no other mode of review by appeal or otherwise. *School Trustees v. Shepherd*, 139 Ill. 114; *Wright v. Highway Commissioners*, 150 Ill. 138; *Mayor, etc., v. Dean*, 62 Ill. App. 41.

At common law, to constitute forgery the instrument need not be such, as if genuine, would be legally valid. If it was calculated to deceive and was intended to be used for any fraudulent purpose, this is enough. Forgery may be committed of any instrument in writing, which, if genuine, would or might appear as the foundation of another man's liability or the evidence of his right. *Reed v. State*, 28 Ind. 396; *Shannon v. State*, 109 Ind. 407; *Com. v. Ray*, 69 Mass. (3 Gray) 441.

COLLINS & FLETCHER, attorneys for appellee.

Regardless of the question of the jurisdiction of the justice of the peace, the proceedings of the justice were void because the complaint, a prerequisite to the search warrant, appears to have been based on hearsay, and the recitals therein contained are not sufficient to constitute probable cause. *Black's Const. L.* 438; *Cooley's Const. Lim.* (6th Ed.) 368; *Lippman v. People*, 175 Ill. 101; *Housh v. People*, 75 Ill. 487; *Myers v. People*, 67 Ill. 503; *People v. Heffron*, 53 Mich. 527; *Swart v. Kimball*, 5 N. W. Rep. (Mich.) 640; *Ex parte Dammig*, 15 Pac. Rep. (Cal.) 620. *Noles v. State*, 24 Ala. 672; *In re Rule of Court*, 3 Woods (U. S. Cir.) 502; *U. S. v. Tureaud*, 20 Fed. 621; *U. S. v. Polite*, 35 Fed. 58; *Erwin v. U. S.*, 37 Fed. 489; *Comfort v. Fulton*, 39 Barb. (N. Y.) 58; *Blodgett v. Race*, 18 Hun (N. Y.), 133; *State v. Gleason*, 32 Kas. 245.

The justice had no jurisdiction to issue the search warrant; and in addition thereto, his acts being null and void on account of the fact that the affidavit and warrant were each defective, proceedings by certiorari as at common law will lie in this case. *People v. Williamson*, 13 Ill. 663; *Doolittle v. R. R. Co.*, 14 Ill. 381; *C. R. I. & P. R. R. Co. v. Whipple*, 22 Ill. 108; *Durham v. Field*, 30 Ill. App. 122; *Miller v. Trustees of Schools*, 88 Ill. 33; *Hyslop v. Finch*,

99 Ill. 184; Donahue v. County of Will, 100 Ill. 102; Gerdels v. Champion, 108 Ill. 141; Commissioners of Drainage Dist. v. Griffin, 134 Ill. 339; Lees v. Drainage Comm., 125 Ill. 49; Smith v. Commissioners, 150 Ill. 391; Schlink v. Maxton, 153 Ill. 453.

The probable cause supported by oath or affirmation prescribed by the fundamental law of the United States is, then, the oaths or affidavits of those persons who of their own knowledge depose to the facts which constitute the offense. United States v. Tureaud, 20 Fed. 621; Lippman v. The People, 175 Ill. 101.

Where an appeal would not afford an adequate remedy to the appellant, certiorari is a proper remedy. Highway Comm. v. Harper, 38 Ill. 106; People v. Judges, 24 Wend. 249; State v. Rose, 58 N. W. 579; State v. Evans, 13 Mont. 239.

MR. PRESIDING JUSTICE FREEMAN delivered the opinion of the court.

Appellant is a justice of the peace and appeals from a judgment rendered in a proceeding in the Circuit Court of Cook County, upon a petition by the appellee for a writ of certiorari as at common law. The petition states that appellee is the owner of certain articles which were seized under a search warrant issued by appellant, which warrant, and the affidavit upon which it was issued, are set forth in full, together with the return of the constable thereon. The warrant recites that complaint has been made before the said justice that "certain forged and counterfeit trade-marks, labels, bottles, caps, corks, cases, boxes, dies, stamps, stencils, plates, names and signatures purporting to be the true and genuine," trade-marks, labels, etc., of certain parties whose names are set out at length, "also certain tools, machinery, printing presses, cuts, type and other material for making the said forged and counterfeit" trade-marks, labels, etc., which "were forged and counterfeited and used for the unlawful purpose of cheating and defrauding some person or body corporate by some person or persons unknown" to the affiant, and are as affiant "verily believes con-

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cealed in and about the building and premises" which are described.

Certain of the alleged false and counterfeit trade-marks and labels, together with bottles and cases of liquors to which they were attached, were seized by the constable under this warrant, and brought before the justice, who adjudged them to be "forged and counterfeit trade-marks, labels, names and signatures" and directed that they be safely kept by the constable as long as necessary for the purpose of being used as evidence on any trial, and afterward destroyed under the direction of the justice.

The petitioner prays for a writ of certiorari, alleging want of jurisdiction in the justice and illegality in his procedure. Appellant moved the court to "quash" the writ and dismiss the petition upon the alleged ground that no common law writ of certiorari lies in such a case; that the facts on the face of the petition did not authorize it; that the justice decided correctly and did not commit any error of law; that petitioner had the right of appeal, and that the writ will not lie when there is another and efficacious remedy. But the Circuit Court held the proceedings before the justice illegal, erroneous and void, and vacated and annulled the same.

It is contended on behalf of the appellee that as the jurisdiction of a justice of the peace depends entirely upon the statute, appellant had no jurisdiction to issue the search-warrant, and that in any event he did not proceed in conformity with the statute. The authority to issue search warrants in Illinois is found in chapter 38, division 8, section 2 of the Criminal Code, which provides that any judge or justice of the peace may, on complaint made on oath, issue a search warrant when satisfied that there is reasonable cause, "to search for and seize counterfeit or spurious coin, forged bank notes and other forged instruments, tools, machinery and materials prepared or provided for making either of them." It is urged that the words "other forged instruments" do not include labels and trade-marks; that these are not the subject of forgery in this State within

the meaning of the statute, and that a search warrant can not issue therefor. Appellant on the other hand insists that the words "other forged instruments," include everything which by statute or the common law is declared forgery or counterfeit; that under section 115 of chapter 38 of the Criminal Code a counterfeit private stamp, label or trade-mark is to be considered a forged instrument, and that every forged thing, the making of which the statute forbids and punishes, comes within this phraseology.

We do not agree with appellee that said sections 115 and 116 of chapter 38 are repealed by an act of the General Assembly entitled, "An act to protect associations and unions of working men and persons in their labels, trade-marks and forms of advertising." Rev. Stat., Chap. 140. The former statute applies to unregistered private stamps, labels or trade-marks, while the latter provides for the protection of those which it requires shall be filed for record with the Secretary of State, and does not seem to cover the whole subject-matter of the former. It can not, therefore, be held to repeal it by implication.

But the sections in question of the earlier statute although they provide a penalty for counterfeiting and simulating trade-marks, do not make these offenses forgery. A counterfeit trade-mark is not necessarily forgery, though it may be where it contains a guaranty, expressed or implied. The false writing or appropriation of a trade-mark or label where it can be made a basis of an action for deceit or warranty and might, if genuine, subject the person signing it to damages, is said to be forgery. But the mere counterfeiting thereof is not necessarily so, even though punishable by statute, and however morally wrong.

It is said that the court does not know and can not say that the labels in controversy do not contain forgeries. A search warrant, however, can not issue unless statutory authority and reasonable cause is affirmatively shown. It is not enough that these may exist. They are not shown in this complaint. The affidavit upon which the search warrant issued states that the affiant verily believes that a

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large number of said alleged forged and counterfeit trademarks, labels, etc., were concealed in and about the premises mentioned, and that some of the reasons for such belief are that one of his agents reports to him that he, said agent, saw certain forged marks and signatures and a large number of forged and counterfeit cases, on said premises. This affidavit—if we assume for the moment that it is sufficient in other respects—contains no definite description of the alleged “forged and counterfeit” matter, nothing to show its nature and whether or not it does in fact include instruments forged in any legal sense. A judge or justice ought not to be “satisfied that there is reasonable cause” to issue a search warrant, upon such an unsubstantial basis.

The statute authorizes the issue of search warrants in four different classes of cases. Section 2, Division VIII, Chapter 38, Rev. Stat. The first of these, as before stated, includes “counterfeit or spurious coin, forged bank notes and other forged instruments.” The others include respectively obscene matter, lottery tickets and gaming apparatus. The words “other forged instruments” may perhaps be considered as embracing anything which by the statute or at common law is forgery and punishable as such. But the language can not be extended further. It is contended by appellee that it can not be extended so far; that it applies only to instruments of the same kind or class as bank notes.

It is a rule of construction that general words following an enumeration of special cases, apply only to things of the same character as those expressly mentioned. Shirk v. The People, 121 Ill. 61. Trade marks and labels are not of the same general character as bank notes, promissory notes, checks, due bills and other like instruments, and if the words “or the forged instruments” followed an enumeration of a list of special things, it might very well be that this rule of construction would have to be applied. “Counterfeit or spurious coin” while not of the same character as forged bank notes, may be used for the same general purpose, namely, as representative of money, and a means of obtaining it dishonestly. But such coin are not forged

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instruments, and there is no enumeration here of such instruments. Only one of them—forged bank notes—is mentioned. The rule of construction contended for does not, therefore, apply, and the words in question doubtless include any instruments, the forging of which is forbidden by law. But it does not appear that the articles described in the complaint and warrant under consideration are so included, and if they are not, the justice was without jurisdiction of the subject-matter.

We have referred to the affidavit which constituted the complaint upon which the search warrant was issued. The statute requires a complaint in writing, verified by affidavit, sufficient to satisfy the justice that there is reasonable cause. It is not enough that, as in this case, the affiant shall aver that he verily believes the alleged forged articles are concealed on certain premises, and state that the reason for such belief is that an agent of his has so reported to him. It is evident that by such an affidavit no facts upon which the alleged belief can be founded are sworn to at all. The justice in this case issued the search warrant upon the statement in effect that the affiant believed a crime had been committed because some one had told him so. The affidavit stated merely a conclusion by the witness, and a conclusion based on no facts within his own knowledge, but on hearsay.

The constitutions of this State and of the United States provide that no such warrant "shall issue without probable cause, supported by affidavit." Const. of Ill., Art. 11 Section 6. Probable cause must be shown "by the production of evidence satisfactory to the court or magistrate." Black's Const. Law, p. 437. And the evidence must be of such facts as shall satisfy the magistrate that suspicion is well founded. Cooley's Const. Law, (6th Ed.) p. 368. In Lippman v. The People, 175 Ill. 101, it is said:

"It has been uniformly held whenever the question has arisen under a statute or constitution containing such provision, that the oath or affirmation must show probable cause arising from facts within the knowledge of the affiant and must exhibit the facts on which the belief is based, and that his mere belief is not sufficient."

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The affidavit in this case was not sufficient to satisfy the justice in any legal or proper sense, and the complaint thus verified did not justify the issue of the warrant, nor confer jurisdiction. "The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures," as the constitution provides, can not be thus lightly violated.

Except upon complaint verified as the statute requires the justice had no jurisdiction to issue the warrant; and for want of such complaint the warrant itself as well as the proceedings based thereon, were without legal force or effect. It was not necessary under the facts in this case to make objection to the complaint before the justice in order to raise the point here. The warrant did not require the officer to bring any person into court and no one was legally summoned.

Appellant contends, however, that the writ of certiorari will not lie, because there is another and an efficacious remedy in the right of appeal.

It is, however, the well settled law in this State, that the Circuit Court has power to award the writ of certiorari at common law to inferior tribunals, when it appears upon the face of the record that the latter have exceeded their jurisdiction, or where they have proceeded illegally, and no appeal or other mode of review is provided. *People v. Wilkinson*, 13 Ill. 660–663; *Hyslop v. Finch*, 99 Ill. 171–184; *Miller v. Trustees*, 88 Ill. 26–33; *Com. of Drainage Dist. v. Griffin*, 134 Ill. 339. As is said in *People v. Wilkinson*, "The great utility of the writ is in its capacity to bring the proceedings of inferior tribunals before the court for reversal where they have exceeded their jurisdiction, within which it is the proper province of the court to restrain them." *Donahue v. County of Will*, 100 Ill. 94–102.

Inadvertently, doubtless, and in the effort to perform his duty to the complainant and the public, the justice issued a search warrant for articles which, although he has judicially found them to be forged as well as counterfeit, are yet, we think, clearly not "forged instruments" within the mean-

ing of the statute, as they are described in the complaint upon which his jurisdiction to issue the warrant was based; and in so doing he exceeded the limit of his jurisdiction. Hence the writ of certiorari was properly awarded.

We have considered the other questions presented in the briefs of counsel but in view of the conclusion stated, do not deem it necessary to extend the discussion.

The judgment of the Circuit Court is affirmed.

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Siegel, Cooper & Co. v. Peter Becker.

1. NEGLIGENCE — *Heedlessness on the Part of the Plaintiff.*— An employe can not recover for an injury which is the result of his heedlessness.

Action in Case, for personal injuries. Trial in the Circuit Court of Cook County; the Hon. RICHARD W. CLIFFORD, Judge, presiding. Verdict and judgment for plaintiff; appeal by defendant. Heard in the Branch Appellate Court at the October term, 1898. Reversed and remanded. Opinion filed July 11, 1899.

JOHN A. POST and JOHN B. BRADY, attorneys for appellant.

GEO. WILLARD and SMITH & WRAY, attorneys for appellee.

MR. JUSTICE SHEPARD delivered the opinion of the court.

The firm of Mohr & Sons was engaged in making repairs to a boiler in the basement of appellant's store, and had in use there a tool or machine called an expander. The appellee was an employe of theirs at work upon a different job in another part of the city, in the prosecution of which the expander was needed. His boss sent him to get it. Arriving at appellant's store he got a ticket which permitted him to go to the boiler room, and was directed to take an elevator down to the basement. He had never before been in the store. He inquired of and was told by the elevator man the direction to take to reach the boiler room, and after some further directions by other persons, he found it. The

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expander being needed where it was, he started away without it.

His course to the boiler room was the proper one, through the shipping room and carbon room into a little anteroom, about six feet by eight feet in floor dimensions, and thence into and along a passageway about seventy feet on the east side of the main engine room and separated from it by a railing, and thence through a doorway directly into the boiler room.

Upon returning, he took the proper course down the long passage at the side of the main engine room and into the little anteroom, but instead of turning to the right and going into the carbon room, he passed straight ahead through a doorway and went into a space behind three freight elevators and the engines that operated them, intended for none but machinery employes. This space was about five and a half feet wide, one side of which was the east wall of the building, and extended along behind the elevator engines, which in turn were behind the elevators that on the other side opened into the shipping room. The elevators and engines were all in one four-sided enclosure, having openings without doors from the elevators into the shipping room. The space behind the engines, into which appellee entered, was opened into through two door ways—one at either end—and appellee entered through the north one. From where he stood, appellee looked past an engine and across the pit of the northernmost elevator, a distance of about eighteen feet, into the shipping room, and being in a hurry to get back to his job, he started to reach the shipping room through the space through which he had looked.

Close by the engine stood one of the large pillars that support the building, and he passed between that pillar and the engine, and stepped into an elevator pit which lay between the engine and pillar and the shipping room. This pit was about twelve inches in depth and about six feet by ten feet in surface dimensions.

While going across this pit the elevator descended upon

him and caused the injuries on account of which he brought this suit.

The space between the pillar and engine through which appellee passed was about twenty-one inches wide, above the base of the pillar, by about three feet long. At the base, where the foot of a person passing would rest, the width of the space between base of pillar and engine was only six inches.

It was through this narrow space that appellee passed before stepping into the pit. The side of the pit opposite to that from which appellee entered, opened into the shipping room.

The testimony of appellee and some others who testified, place the width of the space through which appellee passed between the pillar and engine as greater than we have stated, while other witnesses make it less, but we have accepted the admittedly correct "blue print" that is in evidence, as entitled to controlling weight.

The declaration does not charge any negligence by reason of insufficient lighting. The evidence is plain that the part of the basement traversed by the appellee was abundantly lighted by arc and incandescent electric lights, and he testifies that his eyesight was good.

We are wholly unable to discover from the record wherein the appellant was negligent in any duty it owed to the appellee. It is plain that from the time appellee started to go past the engine and across the pit, the only duty appellant owed him was not to wantonly injure him. Granting that appellee was rightfully upon the premises and behind the elevators, it was his duty to take such care for his own personal safety as an ordinarily careful and prudent person would take under like circumstances.

The case is not that of a person who, in the presence of impending peril, either seeming or real, mistakenly acts and becomes injured. But here is a man nearly sixty years old, in full possession of his faculties, and accustomed to noise and machinery, as he must have been from his occupation as boiler maker, who had passed through the basement into

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the boiler room by an open and perfectly safe route, only a few minutes before. Returning, he had the same route before him to traverse, and did in fact traverse it until he came into the little anteroom at the rear of the carbon room. Then, instead of turning to the right and going into the carbon room, he went straight ahead through a different door and entered into the space behind the freight elevators.

The inference from appellee's testimony is, that as soon as he got behind the elevators he recognized he was in a place through which he had not passed when he was on his way to the boiler room, and from the very nature of his surroundings he must have known it was so.

But instead of retracing his steps a few feet, as any ordinarily prudent person would have done, he undertook to pass out through the narrow opening he saw between the pillar and the engine that led into the elevator pit. That his so doing was not the act of an ordinarily prudent person, does not appear to us to be susceptible of two opinions. No person may under such circumstances so act and recover damages for the consequences of his heedlessness.

Reasonably fair-minded persons should not differ from the conclusion that appellee brought the injury upon himself by his own negligence. And this conclusion is the same whether there had been a substantial compliance with the city ordinances respecting the guarding of elevators, or not. The Circuit Court should have granted appellant's motion for a new trial.

The judgment will be reversed and the cause remanded.
Reversed and remanded.

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William Ripley v. William Leverenz, by his Next Friend.

1. PUIS DARREIN CONTINUANCE—*Effect of The Plea.*—A plea *puis darrein continuance* supersedes all other pleas and defenses in the cause. All previous pleas by operation of law are stricken from the record, and the cause of action is admitted to the same extent as if no other defense

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had been urged than that contained in this plea. Everything is confessed except the matter contested by the plea *puis*.

2. DAMAGES—*Where Jury May Award Substantial Damages.*—Where the plaintiff was not aware at first of having received serious injury, but was, as the direct result, incapacitated from working at his usual avocation and prevented from earning his living by work according to his lot in life, the jury had the right, under the evidence, to award substantial damages.

Trespass on the Case, for personal injuries. Trial in the Superior Court of Cook County; the Hon. JOSEPH E. GARY, Judge, presiding. Verdict and judgment for plaintiff; appeal by defendant. Heard in the Branch Appellate Court at the October term, 1898. Affirmed. Opinion filed July 11, 1899.

M. B. & F. S. LOOMIS, attorneys for appellant.

PAM, DONNELLY & GLENNON and ALBERT E. DACY, attorneys for appellee.

MR. JUSTICE SHEPARD delivered the opinion of the court. This is an action in trespass on the case, brought by appellee, by his next friend, to recover for injuries inflicted upon him through the alleged negligence of the appellant in driving his team and carriage against and upon the appellee in a public street in Chicago. The second count of the declaration charges that the alleged negligent driving by appellant was willful, wanton and malicious.

Both counts allege that the plaintiff was fourteen years of age at the time of the injury complained of. The first plea was the general issue, and under that the case was at issue. Afterward, a plea *puis darrein continuance* was filed, setting up that since the last pleading in the case there had been executed a written release unto the defendant (appellant) by the plaintiff, of all claims and demands for or on account of the cause of action mentioned in the declaration, and that thereby the plaintiff was barred from further maintaining his suit.

To that plea a demurrer was interposed and sustained, and it was ordered that the plea not being sufficient in law to bar the further maintaining of the action, the plaintiff

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ought to recover his damages to be assessed. A jury was thereupon called, and evidence being heard, a verdict of \$2,750 was returned in appellee's favor, and upon that verdict, judgment was rendered.

It appears by the bill of exceptions, that after the trial judge had announced his determination to sustain the demurrer to the plea, but before the order sustaining the demurrer was entered of record, the defendant moved for leave to withdraw said plea *puis* and to reinstate the plea of the general issue, which motion was denied; and that after the entry of the order but before the trial commenced, the defendant moved for leave to file a new plea on the general issue *instanter*, which motion was also denied.

The particular plea *puis* here, was of matter arising after the commencement of the suit and after the plea of the general issue. "The general rule is, that a plea *puis darrein continuance* supersedes all other pleas and defenses in the cause; and, by operation of law, the previous pleas are stricken from the record, and the cause of action is admitted to the same extent as if no other defense had been urged than that contained in this plea. Everything is confessed except the matter contested by the plea *puis*." *Angus v. Trust and Savings Bank*, 170 Ill. 298.

The effect of the plea was to admit plaintiff's cause of action, and every material allegation of his declaration.

To avoid the legal consequences of the acts complained of, and confessed by the plea, the plea *puis* set up the release executed after plea pleaded, and thereby substituted that issue in place of all other defenses presented by the former plea. Such release executed by the minor plaintiff, was properly held, under the demurrer filed to the plea, not to be binding upon the plaintiff, upon the ground that, as appeared by the declaration, it was executed when he was a minor and not *sui juris*.

The plea *puis* so being held obnoxious to demurrer and bad, no question remained in the case except the amount of damages. *Ryan v. B. & O. R. R. Co.*, 60 Ill. App. 612. (Numerous authorities upon pleas *puis darrein continuance*

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are collected in the notes to Puterbaugh's Pl. & Pr., 17th Ed., 244, *et seq.*)

But it is urged that the court erred in not permitting the plaintiff to again file the general issue, either by reinstating the former one or by filing a new one. We do not think there was any available error in such respects. The former plea of the general issue had been voluntarily abandoned by plaintiff, and it was in effect stricken from the files. The record does not show that plaintiff tendered any new plea with his motion, and the court was not bound to give him leave generally to file any paper that he might choose to call a plea of the general issue. *McFarland v. Claypool*, 30 Ill. App. 38.

Furthermore, upon the assessment of damages the whole circumstances of the case were gone into, and everything was admitted in evidence that was offered, except the release and what was said and took place at the time it was signed, and we do not see that any harm resulted to defendant, by refusing him leave to file a new plea of the general issue. Had such plea been filed, the release, and what was said and done in the giving of it, although admissible as a general proposition under a plea of that kind, would not have been admissible over objection by the minor plaintiff who signed it.

So far as the damages are concerned, there was evidence tending to show that appellee, though not aware at first of having received serious injury, was, as a direct result of the injury, obliged to give up working for wages as he had been used to do, and was incapacitated from working in his usual avocation and thereby prevented from earning his living by work according to his lot in life. The jury had the right, therefore, under the evidence, to award substantial damages, and under the second count of the declaration, might, if the evidence in their opinion justified it, award punitive damages. The testimony of the plaintiff's witnesses made a case that would justify the jury in finding that the conduct of the defendant was grossly wanton and malicious, and the jury had the right to believe

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the testimony of such witnesses in preference to the witnesses in behalf of defendant. We discover no good reason for disturbing the judgment under the facts of the case.

We have considered the argument upon the questions of the refusal by the court to admit evidence, and upon the law of the instructions that were given and refused, but we perceive no error therein, and no sufficient reason for prolonging our opinion. The judgment of the Superior Court is affirmed.

George J. L. Janes v. A. M. Bergevin et al.

1. PARTNERS—*Who Will be Held to be.*—Where two brothers are equally prominent in a business, in its name, and in its various transactions, they will be held to be partners as to third parties who trust them upon the faith of what they themselves profess to be.

2. SAME—*When a Person is Estopped from Denying that he is One.*—A man may so act as to make himself liable as a partner whether he be so in fact or not, and when he has so acted he estops himself from denying that he is a partner, as to others who rely upon his actions and give credit upon the faith that he is what he seems to be.

3. ESTOPPEL—*By the Acts of a party.*—One who has knowingly led another person reasonably and in good faith to rely upon the existence of a certain condition of things, is estopped from afterward denying, to the prejudice of such person, that such a condition of things did exist.

Assumpsit, on promissory notes. Trial in the Circuit Court of Cook County; the Hon. ELBRIDGE HANECY, Judge, presiding. Verdict and judgment for plaintiff; error by defendant. Heard in the Branch Appellate Court at the October term, 1898. Affirmed. Opinion filed July 11, 1899.

GARDNER & BURNS, attorneys for plaintiff in error.

WILLIAM E. O'NEILL, attorney for defendants in error.

MR. JUSTICE SHEPARD delivered the opinion of the court. This suit was brought by the defendants in error against one E. H. Janes and the plaintiff in error doing business as Janes Brothers & Company. E. H. Janes having died after

suit was brought, his death was suggested, and the cause ordered to proceed against plaintiff in error, against whom judgment was rendered. The declaration, besides containing the common counts, counts specially upon four promissory notes as being made by the defendants by the name of Janes Brothers & Company, all payable to defendants in error, four months after their respective dates.

The notes were dated, respectively, May 13, 15 and 20, and June 2, 1893. They all read "We promise to pay," and the first three are signed "Janes Bros. & Co., by Geo. J. L. Janes, Pres.," while the fourth one is signed "Janes Bros. & Co."

Besides the plea of the general issue, the plaintiff in error interposed his verified pleas denying his joint liability with E. H. Janes, and denying that he made the notes or either of them.

The defense upon the merits is mainly two-fold, as is indicated by the verified pleas.

Under the name of Janes Bros. & Co., the business of wholesale grocers had been carried on by E. H. Janes either alone or in connection with the plaintiff in error as his partner for four years. The stationery used in such business bore the heading "Janes Bros. & Co., wholesale grocers." The fair inference from the evidence is that the defendants in error had been accustomed for some time previous to the transactions out of which the notes arose, to deal with the Janes concern and sell it goods upon credit. One of the defendants in error testified, and it is not contradicted, that the plaintiff in error was the purchaser of the goods, and "appeared to be head man;" also that he understood through commercial agencies, and a personal statement made presumably for credit purposes, that the business was a partnership composed of E. H. Janes and plaintiff in error. The plaintiff in error testified that he signed all the notes and that they were made for merchandise purchased; that he and E. H. Janes were brothers, he being the younger of the two; that they entered upon the business at the same time; that he was not a member

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of Janes Bros. & Co.; that they had no other brother, and that nobody but E. H. Janes had any interest in the business or composed the "Brothers" or the "Company," following the name Janes; that E. H. Janes furnished all the money to go into the business and hired him at a weekly salary of fifty dollars; that E. H. Janes bought the wines and liquors and had a general superintendency of the business outside of the office; that he, plaintiff in error, bought the groceries and looked after the office part of the business; that he had never told anybody that he was or was not a member of Janes Bros. & Co.; that the goods were all bought in the purported firm name, the sign over the door was Janes Bros. & Co., and all the business was carried on in that name.

The trial court found, under the evidence, that a partnership existed between plaintiff in error and E. H. Janes as to the defendants in error and rendered judgment accordingly. The question of partnership or no partnership was one of fact, and as to it we are not able to say a wrong conclusion was reached.

From the time the business was started the two brothers were equally prominent in its management, equally prominent in its name, and equally prominent in its various transactions. They had no other brother; the name they dealt under carried with it the representation to all persons having transactions with them or either of them, of their identity of interest and responsibility, and their method of conducting the business was such as to emphasize the fact expressed in their business name. Persons so situated as these brothers were, will be held by the law to be partners as to third parties who trust them upon the faith of what they themselves profess. A man may so act as to make himself liable as a partner whether he be so in fact or not, and when he has so acted he estops himself from denying that he is a partner, as to others who rely upon his actions and give credit upon the faith that he is what he seems to be. It is a principle of law applicable to partnership and all other cases of agency, that one who has knowingly led another

reasonably and in good faith to rely upon the existence of a certain condition of things, shall be estopped from afterward denying, to the prejudice of such other, that such a condition of things did exist. The principle is applicable to the facts of this case.

These two brothers, on May 25, 1893, completed the formation of a corporation under the same name of Janes Bros. & Co., and the business was privately transferred to the corporation. The plaintiff in error was made president of the corporation though nominally holding but a trifling amount of the capital stock. All but two shares of \$100 each were issued to E. H. Janes, and there was a third person who was a director and presumably a shareholder.

So far as the record shows, there was no visible change made in the business or its manner of conducting, after the corporation was formed. No notice came to the defendants in error and none to the world appears, except such constructive notice as might have been given by the records in the offices of the Secretary of State and the county recorder. The execution of judgment notes aggregating about \$12,000 was authorized by the board of directors the day before the final certificate of the organization was issued, but it does not appear when, if ever, they were in fact executed. In about six weeks after the corporation was formed, and within two weeks from the time the notes here involved were delivered, the corporation made an assignment for the benefit of creditors.

It is claimed that because defendants in error filed their claim and received dividends amounting to thirty-two and a half per cent thereon from the assignee of the corporation, they are estopped from maintaining this action.

As before said, there was nothing visible to defendants in error or to the world at large, in the conduct of the business of Janes Bros. & Co. as a corporation, to distinguish it from what had previously been carried on by the partnership, and defendants in error knew nothing about the corporation. All they knew was that the concern had failed. Their claim was filed against Janes Bros. & Co., but not as a cor-

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poration, and we do not think that because they made an innocent mistake in such regard and in accepting the dividends, they should be estopped from having judgment for the balance, against their real debtors, who were in substance the whole corporation. The notes were delivered by mail, and the mere fact that there was appended to the signature of Janes Bros. & Co., upon the three earliest dated notes, the words, "by Geo. J. L. Janes, Pres." was not of itself notice to the defendants in error of the creation or existence of the corporation, nor did defendants in error by retaining the notes accept the substitution of a new debtor for their former one. There was nothing on the face of the notes except the single abbreviation "Pres." to indicate to anybody that they were the notes of a corporation. Persons dealing innocently and in the usual course of former transactions, can not have their substantial rights altered to their prejudice by mere legerdemain.

The goods for which the notes were given were all purchased prior to the creation of the corporation, and so far as the defendants in error, at least, are concerned, there was the same holding out of the existence of the partnership after as before the act of incorporation, and the same principles before stated apply with equal force. As to the two items of merchandise and cash on July 3, 1893, aggregating \$170.28, included in the amount for which judgment was rendered, exactly the same rules apply.

Some point is made concerning the order of proof. That was entirely discretionary with the court. The plaintiff in error, as defendant below, was not entitled to have the judgment of the court upon the question of partnership or no partnership, in advance of a judgment upon the whole case.

The brief of defendants in error argues that the Circuit Court erroneously omitted to allow interest upon the notes, and states that the failure to do so is assigned as cross-error. We have made a close examination and fail to find any cross-error assigned, and therefore are not at liberty to consider the argument in that respect.

The judgment of the Circuit Court is affirmed.

Calumet Electric St. Ry. Co. v. Rose Jennings.

1. **PRIMA FACIE CASE—Proof of the Accident.**—Proof of an accident by which the plaintiff, a passenger on a street railway, in the exercise of ordinary care, was injured, makes out a *prima facie* case for him, and places upon defendant the burden of rebutting all the specific negligence charged in the declaration.

2. **DAMAGES—\$2,500 Not Excessive.**—Where a female passenger on a street car was thrown from her seat by the derailing of the car and her collar bone dislocated and pushed forward out of its place, rendering her unable to fully perform her usual household duties, there being some evidence tending to show that it was a permanent injury, \$2,500 is not excessive.

Action in Case, for personal injuries. Trial in the Circuit Court of Cook County; the Hon. JOHN GIBBONS, Judge, presiding. Verdict and judgment for plaintiff; error by defendant. Heard in this court at the March term, 1899. Affirmed. Opinion filed June 29, 1899.

Statement.—Defendant in error (plaintiff below) was injured October 7, 1896, by the derailing of one of the electric cars of plaintiff in error (defendant below) at 103d street, Chicago, and upon a trial before the Circuit Court and a jury recovered a verdict of \$5,000, on which, after a remittitur of \$2,500, judgment for \$2,500 was entered, from which this writ of error is prosecuted.

The declaration shows that plaintiff was a passenger, and had paid her fare; charges that plaintiff in error was negligent, in that it carelessly and negligently drove and operated its car upon its railway at such a high, dangerous, reckless and unlawful rate of speed that at or near the curve of said railway south of 103d street the car left the track, and thereby the plaintiff, who was in the exercise of due care for her safety, was thrown from off the car seat to the floor and against the sides, seats, doors and stove of car, whereby she was injured, etc.; also, that the defendant so negligently and carelessly constructed its road-bed along, and laid its ties and rails thereon along the line of said railway, that on the curve at or a little south of 103d street the car upon which plaintiff was a passenger was thrown off

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and left the track of said railway, and the plaintiff, who was in the exercise of due care for her own safety, was thereby thrown from off the seat of said car to and upon the floor of the same, and against the seats, sides, doors and stove of the car, and injured, etc.

The plaintiff testified in chief, viz.:

"As it was turning the curve the car left the track, and I was thrown on the other side, and my shoulder struck the seat on the other side. I went and tried to pick up the baby again, and as I went there to pick up the baby I was swung over on the other side, and hit my right side on the seat on the other side, and the third time I made an attempt to get the baby, I threw forward on my face and got the cut there, and one right there (indicating), and one up in here, and then a passenger picked me up and the conductor picked up the baby; they took me out and back home on the other car; it was about seven o'clock in the evening; my left shoulder was broke loose from the collar bone; I was hurt on the right side and got three cuts on my face; the company doctor came to see me that night; we sent for a doctor and he came the next morning and my arm was paining me more, and we sent for another doctor; we got Dr. Rankin in and he set my arm; my arm still troubles me—the left arm, the left shoulder. Could not rest in bed at all; had to be sitting up all the time; could not rest in bed because my right side was hurt and my left arm, and I could not lay on it; was disabled for three months; can not attend to my duties yet; did not rest good at all nights during those three months; when I laid down would have to lay on my back on account of my left arm and my right side; can not now lay on my left side on account of my arm; arm is still affected; can hold nothing; if I take my left arm up that way (indicating), I can raise it by holding it with the other; but without the other arm can not hold it up; can not carry my children on it or lift anything more heavy; my right side still affects me; if I go anywhere and carry the baby, my right side bothers me; have suffered much pain; in change of weather always suffer; had no injury before accident, and was a healthy, well woman up to that time; car left the track at the curve; lights all went out; the car went on the bank."

On cross-examination she testified in part, viz.:

"Dr. Rankin called about seven times; he set my arm; he took off the bandages and set my arm up here (indicat-

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ing) and put plasters all over my arm and over the shoulder; the casts remained on the shoulder about eight or nine weeks; it was not a plaster cast; it was adhesive plaster; the shoulder was broken loose from the collar-bone; Dr. Rankin told me it was broken loose from the collar-bone; said he set the fractured bone which was the collar-bone; after Dr. Rankin we had Dr. Miller; that was about two weeks after Dr. Rankin commenced to come; Dr. Miller made seven or eight visits and after that I did not have any doctor and have none now; it is over a year since the last physician called; of course I had to have liniment and stuff right along to use on my arm; the pain in my side is right here (indicating); I felt it right away after the accident; I told all the doctors about it. I have not done any washing since the accident; I do my cooking and all that; I make the beds; I have this pain when I make the beds or sweep; when I raise my arms and take the baby I suffer this pain; I can't lift anything; when I wash the dishes my husband empties the water when he comes home; if it is just a little water I can lift it; but I can not lift a pan full of water; I am in this condition now about lifting."

Dr. Rankin, a physician and surgeon for forty-five years, and who had been surgeon for the Illinois Central and Michigan Central Railroad Companies, testified:

"I was called to treat plaintiff; went to her house and found her suffering a great deal of pain in her shoulder; found the external end of the clavicle bone was dislocated; that is the collar-bone; one end of it is attached to the breastbone and the other end to the scapula—the shoulder blade; it was her left shoulder that was injured; found the end of the bone dislocated and pushed forward in the neighborhood of an inch and the shoulder shortened about an inch and a quarter and down about an inch and a half lower than the other shoulder; the end of the bone was sticking here in the flesh where it should not be, and she could not use that arm; I reduced the dislocation."

On cross-examination he testified that the clavicle was not fractured; that he did not tell plaintiff her collar-bone was broken, but that it was dislocated. Also:

"I have not seen the woman since treating her until to-day; looked at it a little to-day and heard her testify; as to the probabilities of her regaining the use of her arm, that is altogether a question of time; the arm is, as you

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might call it, permanently injured; there might be such a thing as that arm giving her a good deal of use and she might not have a good deal of use for it."

Sarah Fox, called for plaintiff, who lived in the same house with her, saw her every day from the time of the injury for three weeks and slept with her about one month in the summer of 1897, corroborates plaintiff as to her suffering pain, the extent of the injuries and their effect on plaintiff's ability to use her arm and her ability to work. At the close of plaintiff's evidence, counsel for defendant stated to the court that the motorman and conductor were then in the army, and "we don't contest the fact that the car ran off the track, and I therefore did not ask for a continuance of the cause on account of their absence." Also it appears that at the very commencement of plaintiff's evidence, when plaintiff was asked as to the speed of the car, objection was made, and the court said, "What difference does it make about the speed?" Whereupon plaintiff's attorney said, "Well, I don't know that it does, your honor. It left the track."

For plaintiff in error, Dr. Harvey, a physician and surgeon in practice twenty-five years, and then physician for the company, testified that he examined plaintiff five days after the accident when she claimed she was injured, "but found no injury; found her arm done up as if for fracture of the clavicle, but did not find any fracture."

Dr. Huizinga, a physician and surgeon since 1893, and in the employ of the company at the time and when he testified, testified that he examined plaintiff very fully and carefully about one hour on the evening of October 6, 1896; "she complained of having been in a street car wreck and of pains in region of her shoulder, temple and left side, and on examination I found bruises on left temple and left thigh, and that muscles of left shoulder were strained; they were sensitive; could find no abrasion or swelling; examined shoulder where scapula, clavicle and humerus come together, and found them in normal condition; there was no dislocation there."

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By the Court: "That is, you found none?"

A. "I found none; had there been one I would have found it; attended patient two days." He also said, "The woman was apparently suffering when I went there, as she complained of pain in her temples, left shoulder and thigh on the left side." The witness had not much experience as a surgeon.

The foreman of transportation of defendant testified that "at the point where car left the track there is a reverse curve, and it is down grade; when I got to the scene of the accident I traced back the flange of the wheel to where the car left the track and found at that point part of a brick wedged down with the top of the brick on a level with the top of the rail, the west rail going south; the balance of the brick was crushed."

The night foreman of defendant testified that he "made an examination to learn the cause of car leaving the track at 103d street, and found partly crushed brick with half of the brick wedged in between the plank of the crossing, about three or four feet south of the south end of the crossing, wedged into the rail, and the other half of the brick crushed and lying at the side of the rail; I had to take a bar to pry the brick out so that the car following could pass over; this was at the curve."

No other evidence as to how the accident happened was offered.

KENESAW M. LANDIS, attorney for plaintiff in error.

JOHN C. TRAINOR, attorney for defendant in error.

MR. JUSTICE WINDES delivered the opinion of the court.

It is claimed that plaintiff failed to prove her case as made by the declaration; that the damages are excessive, and that plaintiff's counsel in his closing speech made such an appeal to the prejudices and passions of the jury that the judgment can not stand.

We are of opinion that the statement of counsel for the

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company at the close of plaintiff's evidence indicates that he did not expect to contest the charge of negligence made against the company, which is claimed by the brief of defendant in error to have been the fact, and that there was an understanding between counsel, on the trial, that defendant's liability was conceded, and the only question to be considered was the extent of the plaintiff's injuries.

That there was such an understanding between counsel, to the knowledge of the court, would tend to explain the court's remark when plaintiff was asked as to the speed of the car, viz.: "What difference does it make about the speed?" and the further fact that her counsel did not ask that the question be answered.

We are also of opinion that the evidence of plaintiff, as set out in the statement preceding this opinion, is sufficient to make *prima facie* proof that the car was being run at a high and dangerous rate of speed while passing round a curve, and as one of defendant's witnesses says, a reverse curve and down grade. She says the car was turning the curve and she was thrown to the other side of the car from where she was sitting, and when she tried to pick up her baby she was thrown back again, and on making another attempt to get the baby, she was thrown on her face, and was picked up by a passenger. She also said the car went on the bank.

Besides, plaintiff was a passenger, in the exercise of ordinary care, and the car left the track while she was riding upon it. This is not disputed by the company, and makes a *prima facie* case for plaintiff, and placed upon defendant the burden of rebutting all the specific negligence charged in the declaration. N. C. St. R. R. Co. v. Cotton, 140 Ill. 486; Cramblett v. C. & N. W. Ry. Co., 82 Ill. App. 542.

There was no attempt by the company to show the speed of the car, nor to explain the accident, except that a brick was on the tracks. We are of opinion that did not overcome plaintiff's *prima facie* case. We have stated the evidence relating to the extent of plaintiff's injuries, the pain she suffered, the effect upon her ability to work and to use

her arm, and as to the probability of the permanency of such injuries. It is true there is some conflict in the evidence, but we can not say, after full consideration of all the evidence, that the damages are so excessive as to justify us in disturbing the judgment for that reason.

Some of the remarks of plaintiff's counsel to the jury were improper, but when objection was made, counsel was admonished by the court, and we are not prepared to hold that the language of counsel was so intemperate that it did in fact arouse the passions and prejudices of the jury to the extent of vitiating their verdict, though it was large. We are inclined to the opinion that the remittitur was such as to justify the learned trial judge in entering, as he did, judgment on the verdict for \$2,500, and that this judgment does substantial justice in the case. It is therefore affirmed.

Hannibal B. Briggs et al., Impleaded, etc., v. James H. Rice Co.

1. PARTNERSHIP—*Joint Adventures.*—Where a transaction is a mere device to obtain the benefits of a partnership without incurring its responsibilities, whatever the parties may call it, it will be construed to be a partnership.

Assumpsit, on a promissory note. Trial in the Superior Court of Cook County; the Hon. JOHN BARTON PAYNE, Judge, presiding. Verdict and judgment for plaintiff; error by defendant. Heard in this court at the March term, 1899. Affirmed. Opinion filed July 11, 1899.

Statement.—This suit was brought by defendant in error against plaintiffs in error and one Goodall, to recover against them jointly upon a promissory note made by Goodall in the name of G. B. Goodall & Co. The declaration contains a special count on the promissory note and the common counts. The pleas presented general issue, denial of execution and denial of joint liability. Plaintiffs in error and Goodall entered into a contract, the purpose

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of which was the construction of an apartment building. The contract is set out in full in the opinion filed in *Slater v. Clark*, 68 Ill. App. 433, in which case this court had occasion to consider the same contract. By its terms Goodall was to secure the land, erect the building, and after its completion, convey to the plaintiffs in error, upon payment by them of the actual cost and stipulated wages for his services. It was also provided that in the event of a sale of the property by plaintiffs in error at a profit, Goodall should share in the profits to the extent of one-eighth thereof, and that if the property were retained by plaintiffs in error by organizing a corporation to own and control it, then Goodall should become owner of one-eighth of the capital stock of such company. The building was to be constructed as mutually directed by Goodall and plaintiffs in error. Goodall was to keep the plaintiffs in error advised of all contracts made by him in relation to the enterprise, and of his own financial condition.

Aside from the contract, there was evidence to show that the plaintiffs in error had contributed in money toward the carrying out of the enterprise.

The note sued upon was given for materials used in the construction of the building.

The jury found the issues for the plaintiff, defendant in error, and assessed its damages at the amount due upon the promissory note. From judgment upon the verdict this appeal is prosecuted.

WHITEHEAD & STOKER, attorneys for plaintiffs in error.

ASHCRAFT & GORDON, attorneys for defendant in error.

MR. PRESIDING JUSTICE SEARS delivered the opinion of the court.

The only question presented is as to whether the contract in question made plaintiffs in error jointly liable with Goodall for materials used in the construction of the building. This contract has once before been brought to the consideration of this court, and the effect of it was then passed upon. *Slater v. Clark*, 68 Ill. App. 433.

There was evidence in that case, as there is here, showing that the plaintiffs in error contributed money to the carrying out of the enterprise, in the profits of which they and Goodall were to share. The court then held that the plaintiffs in error were jointly liable with Goodall for materials used in the construction of the building. We are disposed to so hold now.

The decisions of the courts upon the effect of land and building contracts as creating joint obligations differ as applied to the facts of differing cases. Each of such contracts necessarily stands upon the provisions in the individual case.

There is reason for regarding this contract as an attempt to accomplish the carrying out of a joint venture in the name of one of the adventurers and for the mutual profit of them all. The terms of the contract warrant such a conclusion.

When so regarded, the case comes within the application of the rule announced in Morse v. Richmond, 97 Ill. 303; State Bank v. Butler, 149 Ill. 575.

The judgment is affirmed.

Illinois Central Railroad Co. v. William Clark.

1. NEGLIGENCE—*May be Proved by Circumstantial Evidence.*—Negligence, like any other fact, may be proved by circumstantial evidence.

2. ORDINARY CARE—*A Question for the Jury.*—The question as to whether the plaintiff at the time of the injury was in the exercise of ordinary care, is one of fact for the determination of the jury.

3. SAME—*In Approaching Private Crossings.*—Where a railroad company constructs a walk across its right of way, at a street crossing, from the end of the sidewalk of the street to the end of the sidewalk on the other side, so as to form a connection of the walks, and tacitly consents to the use of such walk by the public, it practically extends the walks of the street across its right of way, and under such circumstances it is incumbent upon it to exercise substantially the same care for the safety of the public as the law requires of it when its train is approaching a public crossing, except perhaps in the matter of ringing a bell or sounding a whistle.

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Action in Case, for personal injuries. Trial in the Superior Court of Cook County; the Hon. PHILIP STEIN, Judge, presiding. Verdict and judgment for plaintiff; appeal by defendant. Heard in this court at the October term, 1898. Affirmed. Opinion filed July 20, 1899.

JOHN G. DRENNAN, attorney for appellant; JAMES FENTRESS, of counsel.

Where a pedestrian, even at a regular railroad crossing, is injured by a car door being open, cinder, coal or stick falling, etc., of the original construction or loading of which there is no complaint, the plaintiff must aver and prove negligence. Negligence will not be presumed from the mere happening of the accident. Case v. C., R. I. & P. Ry. Co., 19 Am. & Eng. Ry. Cases, 142, and citations; Wiedmer v. Ry. Co., 114 N. Y. 462; L. & N. Ry. Co. v. Wade, 36 S. W. Rep. 1125; De Vau v. P. & N. Y. C. R. R. Co., 130 N. Y. 632; C. & N. W. Ry. Co. v. Moranda, 93 Ill. 303; Same v. Same, 108 Ill. 583; 2 Thompson on Negligence, 1227.

“Although a railroad company has, by permitting people repeatedly to cross its tracks at a point where there is no public right of passage, given an implied license to do so, it owes no duty of active vigilance to those crossing to guard them from accident. The licensees acting under it take the risks incident to the business.” Sutton, Adm’r, v. N. Y. C. & H. R. R. Co., 68 N. Y. 243; Larmore v. C. P. I. Co., 101 N. Y. 391; Nicholson, Adm’x, v. Erie Ry. Co., 41 N. Y. 525.

To constitute a highway, it must be one over which all the people of the State have a common and equal right to travel, and in which they have a common, or at least a general interest to keep unobstructed. Wood on Railroads, Vol. 1, 2d Ed., 790.

In order to cast upon the railway a duty toward persons crossing its tracks, the person so using the track must be at a place where the public have an actual right as against the railway company to cross, and not at a place where the crossing is at the sufferance and mere grace of the railway company. McCreary v. B. & M. Ry. Co., 153 Mass. 300.

JAMES O. McSHANE, attorney for appellee.

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Where the public are permitted to pass over the depot grounds in going from one part of a city to another, such grounds are made *quasi* public by the general use to which they are appropriated, and a person does not become a trespasser by passing over them in a proper manner. I. C. R. R. Co. v. Hainmer, 72 Ill. 347; L. E. & W. Ry. Co. v. Zoffinger, 10 Ill. App. 258. See also C. C. R. R. Co. v. Frelka, 110 Ill. 498, and T. W. & W. Ry. Co. v. Main, 67 Ill. 298; Skjeggarud v. M. & St. L. R. R. Co. (Minn.), N. W. Rep. 572.

When a railroad company has for years, without objection, permitted the public to cross its tracks at a certain point, not in itself a public highway, those using the crossing are not trespassers, and the company owes the duty of reasonable care toward them. Taylor v. D., etc., Canal Co. 113 Pa. St. 162.

In a note to Turner v. Fitchburg R. Co., 35 Am. & Eng. R. Cases, 320, it is said:

"Where a railroad company knowingly permits a place in a highway crossing to be used as a crossing by the general public for years, the public thereby acquire an easement in such crossing, and the company is bound to use reasonable care at such crossing and give the statutory notice and warning of the approach of trains (Byrne v. N. Y. C. & H. R. R. C., 104 N. Y. 362; 58 Am. Rep. 512; Barry v. N. Y. C. & H. R. R. Co., 92 N. Y. 289; 13 Am. & Eng. R. Cas. 615); and exercise care similar to that required at a legally-established public highway crossing." Harriman v. P., C. & St. L. R. Co., 45 Ohio St. 11; 32 Am. & Eng. R. Cas. 37; Kelly v. S. M. R. Co., 28 Minn. 98; 6 Am. & Eng. R. Cas. 264; Taylor v. D. & H. C. Co., 113 Pa. St. 162; 28 Am. & Eng. R. Cas. 656; 57 Am. Rep. 446.

MR. JUSTICE ADAMS delivered the opinion of the court.

This is an appeal from a judgment rendered in favor of appellee and against appellant for \$4,000, in an action for alleged negligence, by reason of which appellee was injured. Appellant has eight railway tracks running north and south in the city of Chicago, and crossing what would be part of Seventy-second street, an east and west street if that street

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were produced across the right of way. The tracks are numbered 1 to 8, number 1 being the extreme western and number 8 the extreme eastern track. Prior to the fall of 1893 the appellant's right of way was inclosed by wire fences about seven feet high on the east and west sides. In the fall of 1893 appellant erected a depot or passenger station on the west side of its right of way, and about 105 or 106 feet north of what would be the north line of Seventy-second street, if produced across the right of way, and an elevated platform in front of the depot between tracks 1 and 2. At the same time appellant constructed a walk of the width of about six feet across its tracks on what would be the north six feet of Seventy-second street if produced as above stated. This walk commenced at the western end of the sidewalk on the north side of Seventy-second street, east of the right of way, and at its western end connected with the north sidewalk space of Seventy-second street. A walk or ground platform ran from the elevated platform to this cross-walk. The surface of the cross-walk was on a level with the surface of the rails. On the north side of Seventy-second street, west of the railroad right of way, there was no sidewalk at the time of the accident for a distance of about 100 feet. When the walk was constructed across the tracks, openings were made in the wire fences at the ends of the walk, and gates were hung in the openings. A witness for appellant testified that at the time of the trial these gates were open and nailed back, and the evidence shows that at the time of the accident, and prior thereto, there was nothing to obstruct passage through the openings to the walk from Seventy-second street east or west of the right of way. The evidence shows that from the fall of 1893 this walk across the right of way was used generally by all persons desiring to cross that way. It was admitted on the trial by appellant's counsel that prior to the accident people had been in the habit of crossing the right of way on the walk without restriction by appellant. A witness for appellant testified that there are wooden sign boards on posts near the gates at the openings to the cross-

walk, which can be seen from the east or west side as you approach the station, on which signs were the following words: "Notice. Station Grounds. For use only by this company and its patrons; not a public thoroughfare. Illinois Central Railroad Company;" that he was not sure whether the notice was on both sides of the boards or not. South of the cross walk was a signal structure, and it was the custom for south-bound trains, except through passenger trains, to stop north of the cross-walk until they got a signal to proceed. Ryan, conductor of the train which is alleged to have caused the injury, testified:

"They generally always made it a practice to stop north of that crossing, not to block it, because, generally, we met a dummy pretty near every night; we used to come in there about that time, and we generally made a practice to stop north of the crossing and let the people go by."

A short distance south of the crossing there were switches. A transfer train of appellant, consisting of eleven box cars and a caboose, left South Chicago about 5:30 o'clock, p. m., April 8, 1895, on the South Chicago branch of appellant's road, proceeded north past Sixty-seventh street, got on main track number 5 above mentioned, and backed south on that track to Seventy-second street, the caboose being in front and the engine in the rear. The train was proceeding south to Fordham yards, which is about Eighty-third street. The object of the trip was to transfer the cars from South Chicago to Fordham yards. Cheltenham, the Baltimore and Ohio junction, South Chicago and Fordham yards are south of Seventy-second street, in the order mentioned. There were some refrigerator cars in the train and three fruit cars, but where in the train the refrigerator and fruit cars were does not appear. The doors of the refrigerator cars are two feet in width by eight feet in height, and are a means of ingress and egress. The fruit cars have small doors, which are merely for the purpose of ventilation; they are made of pine, weigh about four pounds, are fifteen and three-fourths inches square, and are on the sides of the car, one near each end, the lower end of each door being four feet above the top of the rail. There was a hasp

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attached to about the middle of the door which, when the door was closed, fitted over a staple attached to the car, and the door was fastened by means of a pin or hook (which of the two does not appear from the evidence) dropped through the staple outside the hasp. There was a chain to the pin or hook, which was fastened to the car. There was a like contrivance for fastening the door back when opened back against the side of the car. When the door stood open, at a right angle to the side of the car, the hasp extended out from the outside edge of the door three and one-half inches, so that the whole outward extension from the side of the car, including the hasp, was nineteen and one-fourth inches. The fruit cars extended outside the rails two feet, the refrigerator cars two feet two inches. Dickens testified that the latter cars are three or four inches wider than the former.

When the transfer train above described got on main track 5 it was backed south toward Seventy-second street, the engine being at its front or northern end pushing it, and the caboose being at its rear or southern end. When the caboose was within from three to four car lengths of the cross-walk above described, the train stopped for a signal, which not being given, the conductor, in about from one to two minutes, got off the train and walked south of the crossing to see if the switches were right. While he was thus engaged the train was backed toward the switches, across the cross-walk, blocking it, the caboose being about two car lengths south of the walk, when the train again stopped for about two minutes, after which, on a signal from the conductor, it proceeded south toward Fordham yards, rear end forward as before.

It was about 7.30 o'clock in the evening when the train arrived at Seventy-second street. The evening was dark and cloudy; the crew used lighted lanterns. It had been raining during the day, but whether it was raining at that time is not clear from the evidence.

The plaintiff was sixty-one years of age at the time; he had been in the service of appellant, as switchman, brake-

man and conductor, for thirty-two years, but quit the appellant's service in 1894, and had been engaged in carrying on a blacksmith's shop for about eight or ten months prior to the time of the accident. He was perfectly familiar with the right of way of appellant and with Seventy-second street in the vicinity of the cross-walk, and with the manner of running the trains. Appellee testified that in the evening in question he had been at a place between Seventy-third and Seventy-fourth streets on the east side of the railroad right of way and south of Seventy-second street; that intending to go to a place on Seventy-second street, west of the right of way, he walked north to Seventy-second street and west on the north sidewalk of that street to the walk across appellant's tracks; that as he approached the tracks, walking on the cross-walk, he saw a train moving slowly over the crossing on track number 3; that when he got up to track number 8 he saw the transfer train standing close to the crossing on track number 5; that he continued to walk west on the cross-walk till he came to track 6, stood on track 6 about a minute, then stepped in between tracks 6 and 5, intending to cross ahead of the train, but the train started up and he saw that he "couldn't make it." The space between tracks 5 and 6 is seven feet two inches in width, and appellee says that when the train was passing him he stood about the center of that space and the center of the sidewalk, and about a foot from the body of the cars; that he had looked both north and south for other trains, and at the time his body was fronting toward the car and his face in a southwesterly direction, and that as the train passed him, the ventilator door of one of the fruit cars struck and knocked him down; that he fell toward the south and his left hand went under the wheel, which passed over his arm between the wrist and elbow, and that he immediately got up and saw, from one to one and a half car lengths south of him, the fruit car door sticking straight out from the car. Appellee's injury was described by a surgeon who attended him that evening, as a crushing injury of the lower third of the arm. Appellee's arm was amputated the evening he was injured.

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R. A. Winchester testified that between seven and eight o'clock in the evening in question he was standing at the corner of Seventy-sixth street and Woodlawn avenue, and saw a switching crew pushing a train south; that he was on the east side of the train, between tracks 5 and 6; that he recognized the engineer of the train, Al Heidenberg, and that he saw the ventilator door of a fruit car on the train sticking out from the car.

Heidenberg was the engineer of the transfer train that evening. He was dead at the time of the trial.

The contested questions of fact are whether the ventilator door of the fruit car was open; whether, if so, appellant was negligent in permitting it to be open; whether appellee was injured at the place and in the manner claimed by him, and, if so, whether he exercised ordinary care. Ryan, the conductor of the transfer train, testified that when the train left the Baltimore and Ohio junction to go north to Seventy-second street, the doors were all closed. He says that he observed this as he walked along the side of the train; also that it was the duty of Dickens, the hind switchman, to see that the train was all right before starting. This witness did not testify that the doors were fastened, and his evidence that they were all closed is not very satisfactory, for the reason that he seems to rely on what he says was his custom, viz., to walk alongside the train before starting. Dickens testified that he inspected the train after it was made up, and observed it when it left the Baltimore and Ohio junction, and that the ventilator doors of the fruit cars were then all closed; that he did not know whether they were fastened or not. Ralph Woodcock testified that he was car inspector at Fordham yards; that he inspected the train after its arrival there the evening in question, and that the car doors were all closed and fastened, but it appears from the record, though not from the abstract, that the witness was not at the station at Fordham yards when the train arrived there. He also testified that it was in the neighborhood of 7:15 o'clock p. m. when the train arrived, and that he didn't think it was dark, while Ryan

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and Dickens both testified that it was 7:30 o'clock p. m. when the train passed Seventy-second street going south, and that it was dark, and Ryan, conductor, testified that it was eight o'clock p. m. when the train reached Fordham yards. Ellerty, station agent at South Chicago, says he saw the train there after it was made up, and had no knowledge of any ventilator doors being open.

We are of opinion that the jury was warranted by the evidence in finding that the ventilator door was open at the time of the alleged accident. Appellant's counsel contend that it was incumbent on appellee to prove, as a distinct, independent fact, that it was owing to negligence that the door was open; that negligence can not be inferred from the mere fact that the door was open. It is not necessary to prove negligence by direct, positive evidence. It may be proved, like any other fact, by circumstantial evidence. There is no evidence that the train stopped while proceeding north to the place where it backed onto main track 5, nor after it left the latter place until it reached Seventy-second street backing south. There was, therefore, little, if any, opportunity for any person not belonging to the crew to interfere with the door, and it seems improbable that if the door had been fastened in the manner heretofore described, the mere motion of the train would have unfastened it. Under these circumstances, we are of opinion that the jury could legitimately infer from the fact that the door was open, that it was left open by the negligence of appellant's servants.

Appellee testified that when he arose after the injury he walked north thirty feet or more, thinking he could get around the train more quickly than it would pass him, and go home, but when he saw the engine which was pushing the train about to pass him, he returned to the cross-walk and went west toward his home. No one saw him at the place of the injury, nor did any of the crew know of the accident until the next day. Dickens, who was on the rear end of the caboose (the front end as it was pushed south), testified that as the train approached the cross-walk and

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was about three or four car lengths from the walk, he saw some one standing on or so close to track 5 that the train could not clear him; that he "hollered" to him, and he walked east out of the way; that it was too dark for him to recognize the person.

Egan, appellant's assistant superintendent, testified that he heard of appellee's injury about 11 o'clock, A. M., the next day after it occurred, and that shortly after 12 o'clock he went to Seventy-second street and investigated; that he found blood stains between tracks 5 and 6, and seventy-five feet north of the cross-walk he found pieces of bone and flesh underneath the ball of the east rail of south-bound track 5; that he traced the blood stains back to the cross-walk and along it to the west line of the right way, where the stains were lost, there being sand and no sidewalk there; that he had seen hundreds of places where accidents had happened, and that the indications of such an accident as the present always appear under the ball of the rail. The witness further testified that, after investigating as stated, he went to appellee's house, about 3 o'clock P. M.; that appellee's arm had then been amputated; that he was in bed and his mind seemed to be very rational, and that appellee told him that he was struck by the open door of a refrigerator car; that he said nothing about a fruit car. Lambert, yardmaster of appellant, was with Egan when the latter investigated, and also with him at appellee's house, and testified substantially as did Egan, except that his testimony is not quite so positive as to what was found under the rail. He testified that he saw blood and something that looked like flesh, in the hollow of the rail. On cross-examination he said he could see it was human flesh and blood, but could not tell whether there was bone or not. This witness also testified that appellee said he was struck by a refrigerator door. S. L. Losey, appellant's chief claim agent, testified that the next day after the accident he heard of it, and immediately went to appellee's house; that appellee seemed to be in full possession of his mental faculties, and talked frankly, freely and cheerfully,

and that appellee told him that he was struck by a refrigerator car door. In rebuttal of this evidence, appellee called Eleanor E. Christy, a surgeon who assisted in amputating appellee's arm, and Mrs. Rogerson, appellee's daughter. Mrs. Christy testified that appellee's coat was not cut where his arm was crushed; that he had on an ordinary shirt and an undershirt; that there was very little evidence of profuse bleeding, as in the case of a sharp cut, and that after the operation a hypodermic injection of strychnine and morphine was administered to appellee, and that for two days thereafter he was kept under the influence of chloral and sulphur. Mrs. Rogerson testified substantially the same as Mrs. Christy as to the garments worn by appellee and the opiates administered to him, and in addition testified that she was present when Egan and Lambert interviewed appellee, and that he told them he was struck by the ventilator door of a fruit car.

Appellee, recalled, testified that he did not tell Egan, Lambert or Losey that he was struck by a refrigerator door.

We think the jury were justified by the evidence in rejecting appellant's theory, based on the evidence of Egan and Lambert, that appellee was injured seventy-five feet north of the crossing, and in finding that he was injured at the place and in the manner claimed by him.

Track 6, on which appellee was standing just before he stepped into the space between tracks 5 and 6, is used exclusively for north-bound freight, and the tracks south of the cross-walk are straight for several miles. Under these circumstances, appellant's counsel urges that it should be held, as matter of law, that appellee was guilty of negligence or want of ordinary care which contributed to the injury; but in view of the decisions in this State, none of which within our knowledge has gone so far, and this court being intermediate between the trial and Supreme Courts, we do not feel warranted in holding otherwise than that the question whether appellee exercised ordinary care was one of fact to be decided by the jury. The declaration con-

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tained three counts, in the first two of which it was averred that appellant's right of way crossed Seventy-second street, a public highway. Appellant's attorney, at the close of the evidence, moved the court to exclude appellee's evidence on the ground that the evidence was that appellant's tracks did not cross Seventy-second street, whereupon appellee, by leave of the court, filed an additional count, in which it is averred as follows:

“For that whereas, prior to and on, to wit, the 8th day of April, 1895, the defendant was possessed of and was operating a certain railroad extending, among other places, from the city of Chicago, county of Cook and State aforesaid, to southern points, eight tracks of which said railroad running parallel and adjacent thereto, then and there crossed Seventy-second street, in the city of Chicago, which was then and there a public highway upon each side of and abutting upon the defendant's right of way,” etc.

When this count was filed, appellant's attorney again moved to exclude appellee's evidence on the same ground as formerly, which motion was overruled, and then appellant's attorney pleaded the statute of limitations, to which plea the court sustained a demurrer. These rulings of the court are assigned as error. The evidence failed to prove that appellant's right of way crosses Seventy-second street; on the contrary, appellee's own testimony was to the effect that it does not. While the additional count avers that appellant's tracks crossed Seventy-second street, it also, in describing the street, avers that it is “a public highway upon each side of and abutting upon the defendant's right of way.” The street could not abut on appellant's right of way if it crossed it. Certainty to a certain intent in general is all that is required in a declaration, and taking the allegations of the count together, they may be understood as meaning that the tracks crossed what would be Seventy-second street, which abutted on the right of way, if produced across the right of way. But even though there is a variance between the declaration and the evidence, the question remains whether such variance is material. Appellant constructed a walk across its right of way

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from the west end of the north sidewalk of Seventy-second street east of the right of way of about the same width as the sidewalk, and tacitly consented to the use by the public of the walk as if it were an extension of the north sidewalk of the street, and thus practically, if not in law, extended the north sidewalk of the street across the right of way. Under these circumstances, when appellant's train was approaching the cross-walk it was incumbent on it to exercise substantially the same care for the safety of the public as the law requires of it when its train is approaching a public crossing, except perhaps in the matter of ringing a bell or sounding a whistle. Kelly v. Railroad Co., 28 Minn. 98; Clampit v. Railroad Co., 84 Ia. 71; Taylor v. Railroad Co., 113 Pa. St. 162; R. R. Co. v. Hammer, 72 Ill. 347; Skjeggarud v. R. R. Co., 38 Minn. 56; Schindler v. R. R. Co., 87 Mich. 400; Webb v. R. R. Co., 57 Me. 117; Barry v. R. R. Co., 92 N. Y. 289.

Such being the law it is not material whether or not Seventy-second street is a legally established highway across appellant's right of way, and therefore the variance, if any, is immaterial. We are of opinion that appellant's motion was properly overruled and the demurrer to its plea properly sustained.

It is objected that the court erred in admitting certain evidence produced by appellee and in the giving and refusal of instructions. We find no error in these respects which we deem ground for reversal.

The judgment will be affirmed.

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John King v. Bridget Mitchell, Executrix, etc.

1. PRACTICE—*Where the Writ of Coram Nobis Lay at Common Law.*—By section 66 of the Practice Act the writ of error *coram nobis* is abolished, and it is provided that errors of fact, which by the common law could have been corrected by said writ, may be corrected by the court in

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which the error was committed, on motion in writing made at any time within five years after final judgment.

2. SAME—*Decisions on Motions in the Nature of Writs of Error Coram Nobis.*—A decision on a motion in the nature of a writ of error *coram nobis* is a decision in the cause within the meaning of section 59 of chapter 110, entitled Practice.

3. SAME—*Exceptions on Motions in the Nature of Writs of Error coram nobis.*—Exceptions to the ruling of the court on a motion in the nature of a writ of error *coram nobis*, made at any time within five years after the rendition of final judgment, may be preserved by bill of exceptions.

4. SAME—*Plea in Abatement, When Unnecessary.*—A summons issued after the death of a person named in it as plaintiff is void and so are all proceedings thereunder. A plea in abatement is unnecessary.

5. ABATEMENT—*Death of the Plaintiff.*—At common law an action abated on the death of the plaintiff.

6. PARTIES—*Death of a Sole Plaintiff.*—The death of a sole plaintiff suspends all further proceedings in an action until there is a revival by the personal representative of the deceased.

7. SAME—*Writs Issued in the Name of a Deceased Plaintiff.*—A summons issued in the name of a deceased plaintiff is void; the service of such a writ upon the defendant is of no legal effect and the court is without jurisdiction.

8. JUDGMENTS—*For or Against Deceased Persons.*—Judgments for or against deceased persons are not generally regarded as void on that account, and while the court ought to cease to exercise its jurisdiction over a party when he dies, its failure to do so is an error to be corrected on appeal, if the fact of the death appears upon the record, or by writ of error *coram nobis*, if the fact must be shown *aliunde*.

Assumpsit.—Common Counts. Trial in the Superior Court of Cook County; the Hon. JONAS HUTCHINSON, Judge, presiding. Finding and judgment for plaintiff; error by defendant. Heard in this court at the March term, 1899. Reversed and remanded with directions. Opinion filed July 20, 1899.

Statement by the Court.—February 24, 1896, John Mitchell commenced an action of assumpsit against John King, the plaintiff in error. The summons issued at that date was returned April 14, 1896, indorsed by the sheriff, “Received too late for service.” Other summonses were issued April 14, May 21 and September 28, 1896, none of which was served.

August 5, 1898, a summons was issued returnable to the September term, 1898, of the court, which was personally served on plaintiff in error August 14, 1898.

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The declaration, consisting of a special count and the common counts, was filed March 26, 1896. Plaintiff in error did not appear or plead to the declaration. October 8, 1898, that being the sixth day of the term, Bridget Mitchell, plaintiff in error and executrix of the will of John Mitchell, deceased, appeared and suggested the death of John Mitchell, whereupon an order was entered that the cause proceed in the name of Bridget Mitchell as plaintiff, finding that due personal service of summons had been had on plaintiff in error, defaulting him for non-appearance, referring cause to court to assess damages, assessment of damages at the sum of \$8,000, and judgment for that amount.

November 21, 1898, that being a day of the November term of the court, John King entered an appearance expressed to be specially and solely for the purpose of moving to vacate the judgment, and moved to vacate and set aside the judgment.

In support of his motion, King filed and read certain affidavits, and defendant filed and read counter affidavits. December 19, 1898, to which day the hearing of the motion had been continued, the court overruled the motion. To reverse the order overruling the motion this writ of error was sued out.

HALEY & O'DONNELL, attorneys for plaintiff in error; OTIS & GRAVES, of counsel.

All errors of fact committed by a court of record in Illinois, which, by common law, could have been corrected by the writ of error *coram nobis*, may be corrected by motion in the court where the error was committed, at any time within five years after the rendition of final judgment. Sec 67, Chap. 110, R. S.; Beaubien v. Hamilton, 3 Scam. 213; Peak v. Shasted, 21 Ill. 137; Hall v. Davis, 44 Ill. 494; Mains v. Cosner, 67 Ill. 536; Claflin v. Dunne, 129 Ill. 241.

Where there is but one plaintiff in an action at law, and he dies before judgment, the suit does not abate, but the person to whom the cause of action survives, may, upon

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suggesting the death, be substituted as plaintiff and prosecute the same as in other cases. Sec. 10, Chap. 1, R. S.

Upon the death of a sole plaintiff, all proceedings are suspended, and, while the suit does not abate, no action can be taken except to suggest the death and obtain an order substituting the legal representative. Riley v. Hart, 130 N. Y. 625; Green v. McMurry, 20 Kas. 190; Jarvis v. Felch, 14 Abb. Pr. 48; Hurst v. Fisher, 1 Watts & S. (Pa.) 438; Case v. Ribelin, 1 J. J. Marsh. (Ky.) 29; Day v. Hamburg, 1 Brown (Pa.), 75; Reed v. Butler, 11 Abb. Pr. (N. Y.) 128.

Entering orders in a case while a party thereto is dead and before substitution of his legal representative is an error of fact and can only be corrected in the court where the error was committed. 2 Tidd's Pr., 1136, 1167; L. A. of A. v. Fassett, 102 Ill. 315; Claflin v. Dunne, 129 Ill. 241.

There is a material difference between the death of a party before and after verdict. Green v. Watkins, 6 Wheat. 261; Martin's Adm'r v. B. & O. R. R., 151 U. S. 673; Bunker v. Green, 48 Ill. 243.

Error of fact is not the error of the judge, and reversing it is not reversing his own judgment. 2 Tidd's Pr., 1136; Day v. Hamburg, 1 Brown (Pa.), 75.

Raising the fact of death, minority, coverture, or slavery upon the record is not contradicting the record. Mains v. Cosner, 67 Ill. 536; Peak v. Shasted, 21 Ill. 137; Ex parte Toney, (a slave,) 11 Mo. 662; Case v. Ribelin, 1 J. J. Marsh. (Ky.) 29.

The writ of error at common law corrected errors of fact arising from minority, death or coverture of a party to a judgment. 2 Tidd's Pr., 1167.

SCANLAN & MASTERS, attorneys for defendant in error, contended that a mere motion to vacate a judgment at a term subsequent to the judgment term can not be disguised as a motion in the nature of a writ of error *coram nobis*. McKinley v. Buck, 43 Ill. 488; Fix v. Quinn, 75 Ill. 232; Coursen v. Hixon, 78 Ill. 341.

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In the nature of things a deceased defendant can not plead in abatement, or otherwise interpose the fact of his own death. But it is the duty, under the law, of a live defendant to plead in abatement the death of the plaintiff. L. A. of A. v. Fassett, 102 Ill. 315; Camden v. Robertson, 2 Scam. 507.

The error in the summons, if any, was cured by the Statute of Amendments and Jeofails. Hurd's Statutes, Chapter 7, Section 6, Divisions 1, 10, 14.

The rule in this State is that a defendant must plead in abatement the death of the plaintiff. Camden v. Robertson, 2 Scam. 507; Mills v. Bland's Ex'rs, 76 Ill. 381; Chicago & Pac. Ry. Co. v. Munger, 78 Ill. 300; Chitty's Pl., Vol. 1, 448.

It was the duty of the plaintiff in error to have raised the question of the disability of the plaintiff to sue *in limine*. Ency. of Pl. & Pr., Vol. 12, 191.

A judgment in favor of a dead man or against a dead man, is not void but voidable. Freeman on Judgments, Sec. 153; Claflin v. Dunne, 129 Ill. 245; McMillan v. Hickman, 35 W. Va. 705; Powell v. Washington, 15 Ala. 803; Danforth v. Danforth, 111 Ill. 236.

After the term has passed in which a judgment is rendered, the court no longer has jurisdiction over the record. The case is off the docket, and the parties are out of court. Cook v. Wood et al., 24 Ill. 295; Oetgen v. Ross, 36 Id. 335; Cox v. Brackett, 41 Ill. 222; Scales v. Labar, 51 Ill. 232; Walker v. Oliver, 63 Ill. 199; Fix v. Quinn, 75 Ill. 232; Coates v. Cunningham, 100 Ill. 463; Gage v. Chicago, 141 Ill. 642; Kelly v. Chicago, 148 Ill. 90; In re Burdic, 162 Ill. 53, 54.

If the motion below had been made in term time, the defendant must have shown that he used diligence to interpose his defense in apt time. Union Co. v. Woodley, 75 Ill. 435; Mendell v. Kimball, 85 Ill. 583; Treutler v. Halligan, 86 Ill. 39; Andrews v. Campbell, 94 Ill. 577; Walsh v. Walsh, 114 Ill. 24; Schultz v. Meiselbar, 144 Ill. 26.

The writ of error *corum nobis*, and the motion substi-

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tuted therefor, under section 67 of the practice act, does not lie when the party complaining, knew of the fact complained of, and could have taken advantage of the alleged error on the trial. Ency. of Pl. & Pr., Vol. 5, 29; Marble v. Van Horn, 53 Mo. App. 361; Jackson v. Milsom, 6 Lea (Tenn.), 515.

A plea to the disability of the plaintiff shows that he is incapable of commencing or continuing his suit, by denying his existence, or that he at the time of the commencement of the suit was a fictitious person, or was dead. Chitty's Pl., Vol. 1, 448; Camden v. Robertson, 2 Scam. 507; Stoetzell v. Fullerton, 44 Ill. 108; Mills v. Bland, etc., 76 Ill. 381; L. A. of A. v. Fassett, 102 Ill. 315, 317, 328; Danforth v. Danforth, 111 Ill. 236; Clafin v. Dunne, 129 Ill. 241; Baragwanath v. Wilson, 4 Ill. App. 80; 1 Archbold's Civil Pr., 304; Bacon's Abridgment, Abatement, F.

The facts showing a want of capacity to sue on the part of the plaintiff should be set up by a plea in abatement. If not so taken it is deemed waived. Pierrepont v. Lovelass, 4 Hun (N. Y.), 681; Jenneson v. Kennedy, 26 N. Y. St. 496; Palmer v. Davis, 28 N. Y. 242; Perkins v. Stimmel, 114 N. Y. 359; Society, etc., v. Pawlet, 4 Pet. (U. S.) 480; Geraty v. Druiding, 44 Ill. App. 440.

After the term has passed when a judgment is rendered the verity of the judgment can not be attacked, and especially not by affidavits. Humphreyville v. Culver, 73 Ill. 485; Goucher v. Patterson, 94 Ill. 525.

The presumption is in favor of the jurisdictional finding, and the same can not be overcome, except where the record affirmatively shows the finding to be not in accordance with the facts. Goodkind v. Bartlett, 153 Ill. 423; Osgood v. Blackmoor, 59 Ill. 261; Barnett v. Wolf, 70 Ill. 76; Miller v. Handy, 40 Ill. 448; Harris v. Lester, 80 Ill. 307; Bannon v. The People, 1 Ill. App. 496.

MR. JUSTICE ADAMS delivered the opinion of the court.

Before the cause was called for hearing, appellee's counsel moved the court to strike the bill of exceptions from the

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record, and filed an elaborate argument in support of the motion.

Counsel for appellee contend that the sections of the practice act allowing exceptions to the decisions of trial courts do not include exceptions to matters occurring after final judgment and at a term subsequent to the term in which the judgment is rendered. This contention is erroneous. Section 59 of the practice act is as follows:

"If, during the progress of any trial in any civil cause, either party shall allege an exception to the opinion of the court, and reduce the same to writing, it shall be the duty of the judge to allow said exception and sign and seal the same, and the said exception shall thereupon become a part of the record of such cause." 3 S. & C. Stat., C. 110, par. 60.

By section 66 of the practice act the writ of error *coram nobis* is abolished, and it is provided that errors of fact, which by the common law could have been corrected by said writ, may be corrected by the court in which the error was committed on motion in writing made at any time within five years after final judgment. Ib., parag. 67. A motion in the cause in the nature of a writ of error *coram nobis* being permissible by section 66, the decision of the court on such motion is a decision in the cause, and is within the meaning of section 59 quoted *supra*.

In Peak v. Shasted, 21 Ill. 137, and Claflin v. Dunne, 129 Ill. 241, the appeals were from orders overruling motions, made after the terms at which the judgments were rendered, to set aside and vacate the judgments, because of errors of fact in the trial courts. In each case the Supreme Court reversed the order of the trial court overruling the motion to vacate. It is obvious that the Supreme Court could not have so acted in the premises in the absence of a bill of exceptions. Other cases might be cited illustrating that exceptions to the ruling of the court on a motion in the nature of a writ of error *coram nobis*, made at any time within five years after the rendition of final judgment, may be preserved by bill of exceptions. In fact, such is the well established practice.

The summons issued August 5, 1898, returnable to the

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September term of the court, was the only summons served on plaintiff in error, and it appears from the affidavits and is undisputed, that at that date John Mitchell, named as plaintiff in the writ, was dead and had been dead at least five months, and also that his attorneys, Scanlan and Masters and William A. Bowles, who sued out the writ of summons, knew that Mitchell was dead as early as March 5, 1898, five months before the writ issued.

The question is, whether the issuing the summons August 5, 1898, in which John Mitchell was named as plaintiff, he having departed this life months before that date, and the rendering judgment against him, based on the service of that writ, were errors in fact remediable by writ of error *coram nobis*, at common law. The errors which may be corrected by motion are, in the language of the statute, "All errors in fact committed in the proceedings of any court of record, and which by the common law could have been corrected by said writ." At common law an action abated on the death of the plaintiff. 2 Tidd's Pr., Sec. 932.

Among the causes for which a judgment might be reversed at common law, by writ of error *coram nobis*, Tidd mentions the following: "Where the defendant, being under age, appeared by attorney, or the plaintiff or defendant was a married woman at the time of commencing the suit, or dead before verdict or interlocutory judgment." 2 Tidd's Pr. 1136-1137.

In *Hurst v. Fisher*, 1 Watts & S. (Penn.) 438, the plaintiff died after appearance of the defendant and before judgment. The court say: "When a judgment in favor of or against a dead man is inadvertently rendered, the party aggrieved may be relieved by writ of error *coram nobis*."

In the present case there was no plaintiff in existence when the writ was sued out, and the original plaintiff's attorneys had no authority to sue out a writ in his name, their authority being revoked by his death. We think thereto can be no question that the erroneous assumption of the court that John Mitchell was living when the writ was issued and served, was an error in fact which affected the

validity of the proceedings, and which, at common law, would be sufficient to warrant the vacation of the judgment on writ of error *coram nobis*. In view of the language of section 66 of the practice act, this conclusion would seem sufficient to dispose of the case; but as it may be argued that, in view of our statute in regard to abatements, the suit did not abate on John Mitchell's death, and therefore the common law rule does not apply, reference will be made to decisions in other States having statutes similar to ours in relation to abatement.

In *Jarvis v. Felch*, 14 Abbott's Pr. 46, which was an action on a promissory note, the plaintiff died pending the suit, and the defendant not knowing of that fact, procured an order dismissing the suit. The court held this irregular, and granted a motion to restore the suit, saying:

"By section 121 of the code, it is provided that no action shall abate by the death of a party, but the court, on motion, at any time within one year thereafter, or afterward, on a supplemental petition, may allow the action to be continued by the representative. The death of a sole plaintiff, although it does not, in the language of the code, 'abate' the action, suspends all further proceedings until there is a revival by the personal representative of the deceased; so that no step can be taken in the further prosecution of the action until it has been continued by the order of the court."

We think it clear that section 10 of the statute of this State in relation to abatement, which provides that in case of the death of a sole plaintiff before final judgment, if it survives to the heir, devisee or personal representative, does not contemplate that any step shall be taken in the cause after the death of the plaintiff and before the substitution as plaintiff of the person to whom the action survives. The concluding language of the section is, "But any of such to whom the cause of action may survive may, by suggesting such death upon the record, be substituted as plaintiff, petitioner or complainant, and prosecute the same as in other cases." The plaintiff being dead, we think it clear that there can be no further prosecution of the cause, until after the substitution permitted by the statute, the simple reason

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being that until such substitution is made there is no one to prosecute it.

In Reilly v. Hart, 130 N. Y. 625, it appeared that one Coggshall instituted a suit to foreclose a mortgage against Lynch and wife and others. The defendants other than Lynch and wife were personally served with process, but Lynch and wife being residents of Louisville, an order was made for service on them by publication for six weeks. Publication had been made for four weeks when Coggshall, the plaintiff in the suit, died, and the publication continued after his death for the remaining two weeks. No other publication was made. Subsequently, the cause was continued by order of court in the name of the executrix of Coggshall, and the cause proceeded to a final decree foreclosing the mortgage against all defendants. The court held that the decree did not bind Lynch and wife, for the reason that they were not served, saying:

“It is not seen how the four weeks publication of the summons before the death, and the two weeks following, could be treated as an effectual service upon those non-resident defendants. During the latter period there was no plaintiff, and in practical effect no action to support any proceedings within that time. The prior publication of the summons was then an unaccomplished attempt to serve it; and to constitute a service in that manner, it was necessary to publish once in each of six successive weeks in the two designated newspapers. There was, then, no service of the summons on those defendants while the action in which the order was made had any party plaintiff, and for that reason it was in a suspended condition and could not support any proceeding then taken for any purpose other than to continue it in the name of the successor as such. Before the death of the original plaintiff the court had acquired no jurisdiction of those defendants. It could not obtain any during the suspension following his death, and consequently it had no jurisdiction of them at the time the executrix became plaintiff; and it does not appear that their persons were thereafter in any manner brought in that relation to the court.”

In the last case the court also held that “the effect of

the death of the plaintiff was to produce a suspension of further proceedings until his successor was placed in that relation to the action."

In Green, Adm'r, v. McMurtry, 20 Kan. 189, one Jones commenced an action against McMurtry, and after a summons and writ of attachment had issued in the suit, but before either of them was served, Jones, the plaintiff, died. The court say :

"We suppose there can be no doubt as to the invalidity of the service of said writs after Jones' death. There must always be two parties to a lawsuit, a plaintiff and a defendant. No action can exist without such parties. A plaintiff voluntarily makes himself such by commencing the action. A defendant, unless he voluntarily appears, can be made a party only by the service of a summons on him, and until the service of the summons no action exists. The service is a jurisdictional matter. But suppose, before any defendant is created, the plaintiff dies; then can a defendant be created with no plaintiff in existence? Can there be a defendant in an action without a plaintiff? Such a thing would seem to be absurd. When the plaintiff in a contemplated action dies, the power to make a defendant in that action dies with him. And any attempt to make a defendant in that action, in *that plaintiff's action*, is futile and ridiculous."

Counsel for defendant in error cite authorities in support of the proposition that plaintiff in error, to avail of the fact that Mitchell was dead, should have pleaded the death in abatement. We do not regard these authorities in point. The question here is whether appellee could avail of the error of fact of the court, in assuming that Mitchell was alive when the writ was issued and served, by motion in the nature of a writ of error *coram nobis*, and we have no doubt on that question. Had the presiding judge known what the attorneys for defendant in error knew, that Mitchell was dead when the writ issued, the judgment in question would not have been rendered.

In Stoetzell v. Fullerton, 44 Ill. 108, a case cited by counsel for defendant in error, it was objected that in a cause in which Reed and Church, plaintiffs, recovered a

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judgment against Fullerton, that Church died pending the suit, and the court said :

“The error, if it be one, was an error of fact, which could only be corrected by a writ of error *coram nobis*.”

In Claflin v. Dunne, 129 Ill. 241, the court quotes with approval the following from Freeman on Judgments :

“Judgments for or against deceased persons are not generally regarded as void on that account, and while the court ought to cease to exercise its jurisdiction over a party when he dies, its failure to do so is an error to be corrected on appeal, if the fact of the death appears upon the record, or by writ of error *coram nobis*, if the fact must be shown *aliunde*.”

Counsel, in urging that plaintiff in error should have pleaded Mitchell's death in abatement, omit to consider that there was no valid service of process on him, and therefore he was not before the court, or bound to plead at all. The writ issued August 5, 1898, was void, the service of that writ on plaintiff in error of no legal effect, and the court was without jurisdiction, either by service or appearance, to render judgment against him. The motion to strike the bill of exceptions from the record is overruled, and the order overruling the motion of plaintiff in error to vacate the judgment rendered October 8, 1898, in favor of defendant in error and against plaintiff in error, is reversed, and the cause is remanded with directions to vacate and set aside said judgment.

Reversed and remanded with directions.

Henry J. Edwards and Henry W. Hoyt v. The Cleveland Dryer Co.

1. STATUTES—*Construction of Sec. 16, Chap. 32, R. S., “Corporations.”*—The liability imposed by section 16 of chapter 32, R. S., entitled “Corporations,” is not penal, but contractual, like that of a surety, therefore *stricti juris*, and should receive a construction in consonance with the nature of the obligation imposed.

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2. SAME—*Construction of Sec. 18, Chap. 32, "Corporations."*—Section 18 of chapter 32, entitled "Corporations," must be strictly construed, and creditors seeking a remedy under it must prove a case clearly within the terms of the section.

3. SAME—*Liability under Section 18, Chapter 32, R. S.*—Under section 18 of chapter 32, R. S., entitled "Corporations," officers, agents and directors are made jointly and severally liable for the debts and liabilities of the corporation made by them in the name of the corporation before all of the stock named in the articles of incorporation is subscribed for in good faith, but some affirmative voluntary act or some active participation or co-operation in the particular transaction is necessary to the incurring of such liability.

4. CORPORATIONS—*Liability of Directors When the Indebtedness exceeds the Amount of Capital Stock.*—The liability under section 18 of chapter 32, R. S., is created only when the indebtedness of the corporation exceeds the amount of the capital stock and is imposed only upon the directors and officers assenting to such indebtedness.

5. SAME—*Assent Must Be by an Affirmative Act.*—The assent of the directors or officers, to the creation of indebtedness of the corporation, can only be given by some affirmative or voluntary act on their part, or at least some active participation or co-operation in the particular transaction out of which the indebtedness arises.

6. SAME—*Rights of Creditors of De Facto Corporations—Estoppel.*—Creditors of a *de facto* corporation, who have dealt with it as a corporation, can not complain, because having so dealt with it, they can not be heard to deny its corporate existence nor hold its officers or agents contracting in its name personally liable.

Assumpsit, on promissory notes. Trial in the Superior Court of Cook County; the Hon. SAMUEL C. STOUGH, Judge, presiding. Verdict and judgment for plaintiff against the defendants Hoyt and Edwards. Appeal by said defendants. Heard in this court at the March term, 1899. Reversed and remanded. Opinion filed July 20, 1899.

Statement.—This is an appeal from a judgment for \$866.26, rendered in an action of assumpsit by appellee against appellants and Frank E. Barnard, Lewis E. Pennington, John Hasse, William N. Thompson, Henry Patterson, Charles Edwards, H. J. Haskell, John S. Perley, E. G. Keith, A. W. Martin, A. L. Nestlerode, C. D. Barnard, Henry J. Edwards and Henry W. Hoyt. Appellants were the only defendants who were served or appeared.

The declaration contains eight special counts and the common counts. Attached to the declaration are copies of four promissory notes dated, respectively, August 2, July

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27, September 2 and October 7, 1897, each for the sum of \$204, payable to the order of the Cleveland Dryer Co., and signed "Thompson & Edwards Fertilizer Co. F. E. Barnard, Sec'y and Treasurer. Countersigned, A. L. Nestlerode, Gen'l Manager."

Each of the first two notes is due four months after date, the third ninety days after date, and the fourth December 15, 1897.

Following the copies of the notes attached to the declaration, is an affidavit of John V. A. Weaver, "Agent and attorney of plaintiff," stating that the demand of the plaintiff is for the amounts due on the notes, copies of which are attached to the declaration, and that there is due to plaintiff, after allowing all just credits, deductions and set-offs, \$816.

The first count of the declaration avers, in substance, that on the 27th day of July, 1897, at the city of Chicago, in said county, "said defendants, pretending to be directors and officers of a pretended stock corporation by the name of Thompson & Edwards Fertilizer Company," assumed to exercise corporate powers and to use the name of said pretended corporation without having theretofore complied with the statute of this State, entitled "An Act Concerning Corporations," etc., that is to say: said defendants did not file or cause to be filed, and there had not been filed prior to, or on, the 27th day of July, 1897, in the office of the recorder of deeds of Cook county, in which county was the principal office of said pretended corporation, a certificate from the Secretary of State of Illinois of the complete organization of said corporation, "and, so assuming and pretending, as aforesaid, said defendants made their certain note in writing, commonly called a promissory note, bearing date the day and year last aforesaid, and then and there delivered the said note to the said plaintiff, in and by which said note, the said defendants, by the name, style and description of Thompson & Edwards Fertilizer Company, by F. E. Barnard, secretary and treasurer, promised to pay to the order of said plaintiff, by the name, style and description of

The Cleveland Dryer Company, at the Drover's National Bank, the sum of two hundred and four dollars (\$204) four months after date, with interest at the rate of seven per cent per annum after maturity, for value received, * * * whereby, and by force of the statute in such case made and provided, said defendants became and were jointly and severally liable to pay to the plaintiff the said sum of money so due upon their said promissory note, so made by them under the name of such pretended corporation."

The second count is as follows:

"For that whereas, also, the said defendants, heretofore, to wit, on the 27th day of July, 1897, in the county aforesaid, as partners doing business under the firm name and style of Thompson & Edwards Fertilizer Company, made their certain note in writing, commonly called a promissory note, bearing date the day and year last aforesaid, and then and there delivered the said note to the said plaintiff, in and by which said note the said defendants, by the firm name, style and description of Thompson & Edwards Fertilizer Company promised to pay to the order of said plaintiff, by the name, style and description of the Cleveland Dryer Company, the sum of two hundred and four dollars (\$204) four months after date, with interest at seven per cent per annum after maturity until paid, at the Drover's National Bank, for value received, by means whereof the said defendants became liable to pay to the said plaintiff the said amount in the said note specified, according to the tenor and effect thereof, and being so liable, the said defendants, in consideration thereof, afterwards, to wit, on the same day and year last aforesaid, at the place aforesaid, undertook and promised the said plaintiff to pay unto the said plaintiff the said amount in the said note specified, according to its tenor and effect."

The third, fifth and seventh counts of the declaration are the same as the first count, with the exception of such changes in the descriptive averments as to make them correspond with the three other notes declared on, and the fourth, sixth and eighth counts, excepting like changes, are the same as the second count.

Appellants, Henry W. Hoyt and Henry J. Edwards, each pleaded the general issue to the whole declaration, and also filed three special pleas to the whole declaration, which

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were verified by his affidavit, viz.: a plea denying the execution of the notes; a plea denying joint liability with the other defendants named in the declaration in respect to the supposed causes of action; and a plea denying partnership with the other defendants named in the declaration in respect to the supposed causes of action. Issue was joined on these pleas.

The certificate of the complete organization of the Thompson & Edwards Fertilizer Company was issued by the Secretary of State January 10, 1886. The object for which it was incorporated was the manufacture and sale of commercial fertilizers; the amount of its capital stock was one hundred thousand dollars, divided into one thousand shares of one hundred dollars each, and its principal office was at the Union Stock Yards, in the city of Chicago, Cook county, Illinois. The evidence shows that all the necessary steps to perfect its organization were taken, except that its certificate of organization was not recorded; that its board of directors elected proper officers, and that it proceeded to the transaction of business as a corporation, and continued so to transact business until about November 1, 1897, a period of more than ten years. Appellant Henry J. Edwards was one of the original subscribers for stock, and, January 11, 1897, was elected a director for one year then next ensuing. Appellant Hoyt became a stockholder in May, 1895, by the purchase of twenty-two shares of stock from William N. Thompson, one of the defendants in the action, the certificates of the shares so purchased being surrendered to the company and new certificates issued to Hoyt in lieu thereof. Hoyt became a director in May, 1895, and continued to be such up to and including the time of the commencement of the suit. Appellee introduced in evidence the by-laws of the company, consisting of twenty-two articles, also minutes of a meeting of the stockholders held January 11, 1897, and minutes of meetings of the directors held January 5th, January 14th and February 26, 1897. At the stockholders' meeting of January 11th there were in all present or represented by proxy, H. W.

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Hoyt, H. J. Haskell, D. W. Kinsley, Jr., John Hasse, Henry Patterson, E. G. Keith, F. E. Barnard, F. M. Barnard, John Q. Perley and C. D. Barnard; and there were elected as directors for the ensuing year H. W. Hoyt, A. W. Martin, H. J. Edwards, F. E. Barnard and John Hasse. At the directors' meeting held January 14, 1897, A. L. Nestlerode was appointed general manager of the Thompson & Edwards Fertilizer Company. At the directors' meeting of February 26, 1897, all the directors being present, certain amendments were made of the by-laws, among which article 12 of the by-laws was amended so as to read as follows:

"The president, vice president and secretary and treasurer (one person) shall jointly be empowered to buy, sell, mortgage or lease any real estate and execute deeds therefor. The secretary and treasurer shall be empowered to sign and evidence notes, checks and drafts necessary for the ordinary business of the company, but all such notes, checks and drafts must be countersigned by the general manager."

At the same meeting the resignation of A. W. Martin was accepted and A. L. Nestlerode was chosen to succeed him as director. F. E. Barnard became secretary and treasurer of the Fertilizer Company, June 1, 1886, and continued to be such up to November 1, 1897, when the company ceased to do business. He had full charge of the financial business of the company.

F. E. Barnard, witness for appellee, testified to the genuineness of the signatures to the notes, which were put in evidence, and that he signed the following document, which was also put in evidence by appellee:

"H. W. HOYT, Prest. F. E. BARNARD, Sec'y & Treas.

"D. W. KINSLEY, JR., Asst. Secy.

Established 1864.

Incorporated 1886.

"UNION STOCK YARDS.

"THOMPSON & EDWARDS COMPANY,

"Tallow, Grease, Calf Skins and Cracklings.

"Telephone Yards 757.

"CHICAGO, July 17, 1897.

"CLEVELAND DRYER CO., Cleveland, O.

"GENTS: We have this day bought from you 100 tons

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dry acid-phosphate at \$10.00 per ton, delivered at Chicago, shipments to be made as follows:

July 19th, '97, 1 car 25 tons.

" 26th, " 1 " 25 "

Aug. 2, " 1 " 25 "

Aug. 9, " 1 " 25 "

" Terms, 2 notes, at 4 mos., with 6% interest per annum added. Freight cash.

" Analysis guaranteed 16% minimum available.

" Yours truly,

" THOMPSON & EDWARDS FERTILIZER CO.,

" F. E. BARNARD, Secy. & Treas.

" Accepted:

" THE CLEVELAND DRYER CO.,

" Wm. Prescott, Prest."

He further testified that the Fertilizer Company received the material mentioned in the contract, and that the notes were given in settlement for the material so received; that he and Nestlerode purchased the material; that he never mentioned the matter to Hoyt at the time of the purchase or at any other time, and neither appellant Hoyt nor appellant Edwards was present when the contract was signed, or at any time when the negotiation for the purchase was going on; that neither Hoyt nor Edwards had anything to do with the execution or delivery of the notes; that no one except himself and Nestlerode had anything to do with the transaction. This witness further testified that the stockholders, at the time he signed the contract, were Henry J. Edwards, Charles Edwards, H. W. Hoyt, L. E. Pennington, John Hasse, Henry Patterson, H. J. Haskell, and himself, F. E. Barnard.

Hoyt testified that, except attending directors' meetings, he had nothing to do with the business of the company; that he knew nothing of and was never consulted about the details of the business by either Barnard or Nestlerode, or with reference to any transaction with appellee, and that he was not acquainted with any of appellee's directors, officers, agents or representatives. The judgment is against appellants Hoyt and Edwards only.

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HAWLEY & PROUTY, attorneys for appellant Henry W. Hoyt.

The indebtedness of the company to appellee for cash advanced by her, and the wages earned by her husband and sons and credited to her as cash, having been incurred before appellant Hoyt became a director of the company, he can not be held liable as a director for that indebtedness. That indebtedness or liability can not be said to have been made by him, and to hold him under the statute, he must have participated, at least, in the making of the debt or liability. Lewis v. Montgomery, 145 Ill. 30; Hoyt v. Hasse, 80 Ill. App. 187; Diversey v. Smith, 103 Ill. 378.

A. W. MARTIN, attorney for appellant Henry J. Edwards.

"A creditor is entitled to recover if he shows that he is a creditor; that the defendants are such officers, agents or directors as are mentioned in section 18, and that one of the provisions of the act, such as the requirement to record the certificate, has not been complied with."

All these facts, however, have not been shown by the appellee in the case at bar. Loverin v. McLaughlin, 161 Ill. 434.

When a creditor has dealt with a corporation as such, a partnership liability can not be enforced, even though the corporation has not been legally organized. Bushnell v. Consolidated Ice Machine Co., 138 Ill. 75; Tarbell v. Page, 24 Ill. 46; Fay v. Noble, 7 Cush. (Mass.) 188; Trowbridge v. Scudder, 11 Cush. (Mass.) 83; First National Bank of Salem v. Almy, 117 Mass. 476.

A *de facto* corporation exists where there is a statute allowing the formation of a corporation for such a purpose, an attempt in good faith to comply with the law, and an exercise of corporate functions under it. Bushnell v. Consolidated Ice Machine Co., 138 Ill. 73, and cases there cited.

JOHN V. A. WEAVER, attorney for appellee, contended that where parties assume to act in a corporate capacity without a legal organization, as a corporate body, those who are charged as corporators or partners are liable if they can be shown to have been such when the con-

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tract sued on was made. *Fuller v. Rowe*, 57 N. Y. 26; *Bank v. Davies*, 43 Ia. 424; *Huer v. Carmichael*, 82 Ia. 288; *Harris v. McGregor*, 29 Cal. 124; *Shorb v. Beaudry*, 56 Cal. 446; *Abbott v. Omaha Smelting Co.*, 4 Neb. 416; *Field v. Cooks*, 16 La. An. 153; *Chaffie v. Ludeling*, 27 La. An. 607.

No mere intention on the part of the members of an unincorporated association to be a corporation will suffice to restrict their individual liability to that imposed upon corporate shareholders, and there being no corporation their liability can not be a corporate one, but must be that of a joint stock company. *Martin v. Fewell*, 79 Mo. 401; *Kaiser v. Lawrence Savings Bank*, 56 Ia. 104; *Coleman v. Coleman*, 78 Ind. 346.

MR. JUSTICE ADAMS delivered the opinion of the court.

Two questions of law are presented for decision: first, whether the judgment can be sustained under section 18 of chapter 32 of the statutes; second, whether it can be sustained against appellants as partners of the other defendants in the action. Sections 16 and 18 are as follows:

Section 16. “If the indebtedness of any stock corporation shall exceed the amount of its capital stock, the directors and officers of such corporation, assenting thereto, shall be personally and individually liable for such excess, to the creditors of such corporation.”

Section 18. “If any person or persons being, or pretending to be, an officer or agent, or board of directors, of any stock corporation, or pretended stock corporation, shall assume to exercise corporate powers, or use the name of any such corporation, or pretended corporation, without complying with the provisions of this act (or) before all stock named in the articles of incorporation shall be subscribed in good faith, then they shall be jointly and severally liable for all debts and liabilities made by them, and contracted in the name of such corporation, or pretended corporation.” 1 Starr & Curtis, Ch. 32, Secs. 16 and 18.

In *Lewis et al. v. Montgomery*, 145 Ill. 30, the court, commenting on section 16, say:

“In *Wolverton v. Taylor*, 132 Ill. 197, the statute sought to be invoked here was under consideration, and we there

held that while the liability imposed is not penal but contractual, it is like that of a surety, and therefore *stricti juris*. This being the case, the statute should receive a construction in consonance with the nature of the obligation imposed. The words employed should be interpreted according to their plain and obvious meaning, and should not be extended by construction so as to embrace cases not clearly within the terms of the statute. The liability is created only when the indebtedness of the corporation exceeds the amount of the capital stock, and is imposed only upon the directors and officers assenting to such excess of indebtedness. This plainly means assenting to its creation. Manifestly, a recognition of the indebtedness by the directors, after it has been so contracted as to become binding on the corporation, should not have the effect of charging them with this statutory liability. After the indebtedness has been created by such agents and in such manner as to constitute it a valid obligation of the corporation, it becomes the duty of the directors to recognize its validity, and, so far as is in their power, provide for its payment."

The court further held that the assent of the directors or officers "could only be given by some affirmative, voluntary act on their part, or at least some active participation or co-operation in the particular transaction out of which the indebtedness arose." The court in the case cited not only held that section 16 should be strictly construed, but practically so construed it, by holding that persons who were directors when indebtedness in excess of the amount of the capital stock of the company was created, but who did not, in fact, participate in the creation of such excessive indebtedness, could not be made liable.

In Huntington v. Attrill, 146 U. S. 657, the question was presented whether the following section of a statute of the State of New York was a strictly penal law:

"If any certificate or report made, or public notice given by the officers of such corporation, shall be false in any material representation, all the officers who shall have signed the same shall be jointly and severally liable for all the debts of the corporation contracted while they were officers thereof."

The court, while holding that the statute was not penal

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in the sense that it could not be enforced by the Federal courts, say:

“As the statute imposes a burdensome liability on the officers for their wrongful act, it may well be considered penal, in the sense that it should be strictly construed.”

We think the decision of the court in *Lewis v. Montgomery*, *supra*, that section 16 must be construed strictly, is equally applicable to section 18, and that the latter section must be strictly construed, and creditors seeking a remedy under it must prove a case “clearly within the terms” of the section. Nor can creditors of a *de facto* corporation, who have dealt with it as a corporation, rightfully complain of this, because, having so dealt with it, they could not, in the absence of the statute, be heard to deny its corporate existence, and could not hold its officers or agents contracting in its name personally liable. *Bushnell v. Consolidated Ice Machine Co.*, 138 Ill. 67.

Counsel for appellee contend that there was a mere joint enterprise of the stockholders, including appellants, under the name of the Thompson & Edwards Fertilizer Company, but we can not accede to this view. In the case last cited, the court say of the Ice Machine Company :

“From the facts set up in the bill, it clearly appears that there was an honest attempt by the incorporators to organize a corporation authorized by the laws of this State. It is shown by the bill that upon the issuing of that certificate its directors elected the proper officers and proceeded to the transaction of business as a corporation, and continued to act as such until the filing of this bill, a period of more than five years. That these facts establish a corporation *de facto* is settled by numerous decisions of this court,” citing numerous cases.

The facts in evidence in the present case are substantially the same as said by the court to have been shown by the bill in the case cited, and in this case, as in that, the sole omission was the failure to file for record the certificate of complete organization.

Appellee’s counsel will hardly contend that the Fertilizer Company was not, at least, a “pretended stock corpora-

tion," and the liability mentioned in section 18 is imposed upon the person or persons being or pretending to be an officer, agent or board of directors of any stock corporation, or "pretended stock corporation." And the liability is that "they shall be jointly and severally liable for all debts and liabilities made by them, and contracted in the name of such corporation or pretended corporation."

Appellee's counsel does not and, in view of the evidence, can not claim that appellants, Hoyt and Edwards, or either of them, in fact participated or co-operated in any way in the purchase from appellee, or in the execution of the notes given in settlement of that purchase, or even that they or either of them had any knowledge of either of those transactions at the times respectively when they occurred. Appellee's counsel bases its right to recover solely on the facts that appellants were directors, and that appellant Hoyt was an officer, and there is nothing else in the record on which to base it.

In *Lewis v. Montgomery*, *supra*, the court say:

"The directors, though the governing body of the corporation, are only its officers and agents, and any subordinate agent appointed by them, or acting by virtue of their suffrage or recognition, does not thereby become their agent, but the agent of the corporation. His acts are the acts of the corporation, so as to make it liable for debts or obligations incurred by him on its behalf, but they are not the acts of the directors, unless commanded or authorized by them."

The court further held, as heretofore stated, that the assent intended by section 16 "could only be given by some affirmative, voluntary act on their part, or at least some active participation or co-operation in the particular transactions out of which that indebtedness arose." By section 16 directors and officers are made liable for indebtedness in excess of the amount of the capital stock to which they assent, while by section 18, officers, agents and directors are made jointly and severally liable for all debts and liabilities made by them. The words "made by them" in section 18 are certainly as strong as the words "assenting thereto" in sec-

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tion 16, and as we think, stronger, and if under section 16 some affirmative, voluntary act, or some active participation or co-operation in the particular transaction, is necessary to the incurring of liability, we can not understand why at least the same should not be necessary under section 18. If the contention of appellee's counsel is correct, that the mere fact that one is a director of a *de facto* corporation such as the Fertilizer Company, would make him personally liable under the statute for a debt contracted by another person, an agent of the corporation, then he would be liable, even though he voted against contracting the liability at a meeting of the board of directors. A construction from which such absurd and unjust consequence might logically follow, must be rejected as unsound. F. E. Barnard made the debt or liability in question, and not appellants or either of them. The liability was created when Barnard contracted with appellee. The Fertilizer Company received the material contracted for and used it in its business, and the execution of the promissory notes in settlement of the liability previously created, was a mere recognition of that liability, and not a violation of the statute. Lewis v. Montgomery, 145 Ill. 47.

However, neither of the appellants knew of or had anything to do with the execution of the notes.

The judgment can not be sustained against appellants as partners. The counts which proceed on the theory of partnership, charge the appellants and twelve other persons as partners. The suit was dismissed as to defendant Thompson. Each of the appellants filed a plea denying joint liability with the other defendants, and also a plea denying partnership with the other defendants. These pleas were properly verified by affidavits, and cast on appellee the burden of proving joint liability of the defendants or partnership. Kennedy v. Hall, 68 Ill. 165; Smith v. Knight, 71 Ib. 148; Walker v. Wood, 170 Ib. 463.

This appellee undertook to do by proving that the defendants were stockholders in the Fertilizer Company, but only succeeded in proving that eight of the thirteen defend-

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ants were stockholders when the liability in question was created. Appellee failed to prove partnership or joint liability of appellant with the other defendants. This renders unnecessary the discussion of the question whether the stockholders were, on the facts proven, liable as partners.

The judgment will be reversed and the cause remanded.

Charles Dennehy & Co. v. Henry Smith et al.

1. **FRAUDULENT CONVEYANCES—*Deeds to Relatives.***—Where a conveyance of real estate is made by a father to his daughter at a time when he is insolvent and wholly unable to pay his debts the conveyance is fraudulent as to all equities above *bona fide* incumbrances and the amounts owing from him to his daughter. Creditors should be allowed to redeem the property by paying the amount due, with interest and taxes paid.

Creditor's Bill.—Trial in the Circuit Court of Cook County; the Hon. ELBRIDGE HANEY, Judge, presiding. Decree dismissing the bill for want of equity: appeal by complainant. Heard in this court at the March term, 1899. Reversed and remanded. Opinion filed July 20, 1899.

ROSENTHAL, KURZ & HIRSCHL, solicitors for appellant.

No appearance for appellees.

MR. JUSTICE WINDES delivered the opinion of the court. Appellant filed a creditor's bill against Henry Smith and Mrs. Kitty Casey on two judgments against Smith, one dated March 6, 1897, for \$3,150, the other March 10, 1897, for \$1,995, on which executions were returned *nulla bona* except for the sum of \$287.75, which was realized on the judgment of \$3,150.

The debts on which the judgments were obtained were contracted in 1891, and at that time Smith was the owner of certain real estate described in the bill, which cost him, October 31, 1890, \$8,075.

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February 5, 1897, Smith conveyed said property, which was then subject to mortgages amounting to \$4,000, to Mrs. Kitty Casey, a daughter of said Smith, the consideration named in the deed being \$17,000. The only money consideration in fact was a pre-existing indebtedness of Smith to Mrs. Casey of \$2,200, including interest.

The appellant by its bill claims that the conveyance to Mrs. Casey was in fraud of its rights as a creditor, because the property in question was worth \$10,000, less the mortgages upon it; that Smith had no other property at the time, except a saloon outfit, which was of very small value; that Smith was totally insolvent at the time of making the deed to his daughter, and offers to pay over to Mrs. Casey the amount due her from Smith in case the court would enter a decree subjecting said property to its claims. The bill also asks for general relief.

Smith and Mrs. Casey answered the bill, to which replication was filed, and the cause heard upon proof in open court by the chancellor, who entered a decree dismissing the bill for want of equity. From this decree the appeal was taken.

In addition to the matters above stated, it appears from the evidence and a stipulation of facts made by the parties, that on March 3, 1897, Smith conveyed to appellant a saloon at No. 183 South Clark street, which was purchased in December, 1890, by Smith, for the sum of \$6,700; that Smith paid interest on the mortgages on the real estate in question in lieu of paying to Mrs. Casey his board and lodging; that Mrs. Casey paid the taxes upon the property in question for the years 1896 and 1897, amounting to \$134.14; and the clear preponderance of the evidence is that on February 5, 1897, the real estate in question was worth more than the mortgages on it and the amount due from Smith to Mrs. Casey, that is, from \$7,000 to \$10,000.

It further appears from the evidence, that Smith was induced to make the conveyance to his daughter because she was his "only heir," as he expresses it, and that he feared that in case of his death his relatives, brothers and

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sisters, might claim an interest in the property; also that Mrs. Casey, at the time the property was conveyed to her, knew little or nothing with regard to the incumbrances upon it, had never seen the property, and did not know anything of its value.

The evidence is not at all satisfactory as to the value of the saloon or saloon outfit which was conveyed by Smith to appellant on March 3, 1897, nor is there any evidence as to what was the consideration for the conveyance. For all that appears Smith may have received cash for this conveyance. It appears that more than six years before, he paid \$6,700 for the saloon, and also appears that on execution sale March 16, 1897, it brought only \$287.85, which amount was applied on the first of complainant's judgments.

It appearing that the conveyance of the real estate in question made by Smith to his daughter at a time when he was insolvent and wholly unable to pay his debts, the transaction was fraudulent, at least as to any equity above the incumbrances and the amount due from Smith to Mrs. Casey, and it would be but equitable that appellant be allowed to redeem the property by paying to Mrs. Casey the amount due her from Smith, which appears to have been \$2,200 and interest on \$1,800 at six per cent from November 29, 1898, as well as the taxes paid by her, and upon making this payment to have the property, subject to the incumbrances of \$4,000, subjected to the payment of appellant's judgments above the sum of \$287.75 realized on the execution sale, unless it should appear on a further hearing that Smith is entitled to a further credit in that regard. *Snyder v. Partridge*, 138 Ill. 173-86; *Martin v. Duncan*, 156 Ill. 274-80; *Dillman v. Nadelhoffer*, 162 Ill. 625-31.

The decree, in our opinion, being inequitable, and the evidence as to the value of the saloon outfit being so uncertain and unsatisfactory, the decree is reversed and the cause remanded for further proceedings consistent with this opinion. Reversed and remanded.

Metropolitan West Side Elevated R. R. Co. v. Albert Skola, Adm'r.

1. **MASTER AND SERVANT—*Liability for the Acts of a Governing Servant.***—The mere fact that one of a number of employes of a common master who are in the habit of working in the same line of employment, has the direction and control of the others as a foreman in respect to such employment, will not of itself, under the circumstances of this case, make the common master liable for the acts of negligence of such governing servant, by which another of the employes is injured.

2. **SAME—*When the Master is Liable for the Acts of a Governing Servant.***—Where the act of negligence of the governing servant is done in the course of his service as a fellow-servant and not in relation to his service as a foreman and governor of the other workmen, the master will not be liable for an injury to a fellow-laborer through such negligence, unless it be for some negligence in employing or retaining such governing servant.

3. **FELLOW-SERVANTS—*When the Verdict Will be Directed for the Defendant.***—If it appear from conceded facts or undisputed evidence that the relation of fellow-servants exists, then it may become a question of law and be the duty of the court to direct the jury as to their verdict in that behalf.

Action in Case.—Death from negligent act. Trial in the Superior Court of Cook County; the Hon. SAMUEL C. STOUGH, Judge, presiding. Verdict and judgment for plaintiff. Error by defendant. Heard in this court at the March term, 1899. Affirmed. Opinion filed July 20, 1899.

Statement.—Joseph Triska, plaintiff's intestate in this suit, came to his death through injuries received on the 8th of August, 1895, while engaged as an employe of plaintiff in error. Suit was brought in the court below by defendant in error, Albert Skola, as administrator of Triska's estate, against plaintiff in error, to recover damages for alleged negligence, which caused his death.

Triska, at the time of his death, was twenty-eight years of age; had worked for plaintiff in error for several months immediately preceding his death, in the capacity of air-brake inspector and motor cleaner, which latter service he was performing during the few hours immediately preceding the injury which caused the death.

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The plaintiff in error, at the time of the injury, was managing and operating the Metropolitan West Side Elevated Railroad. The place of accident was on the structure of that company at a point between Laflin street and Center avenue in the city of Chicago. The elevated railway structure in this vicinity consisted of four tracks running east and west. On the north side of the structure were two tracks over which regular passenger trains ran on schedule time. The other two tracks on the structure were used respectively for the purpose of storing idle cars, and repairing and cleaning cars. The track farthest south was the one that was used for storing idle cars. The track next to this was the one on which cars needing to be repaired, cleaned or inspected, were temporarily stored while they received such attention. It was on this last mentioned one of the four tracks that the accident occurred. On this track a gang of men, Triska among the number, started to work between seven and eight o'clock in the evening, performing the regular work of repairing, cleaning and inspecting cars. Some of these men did the work of cleaning, some inspecting and some repairing. Each car was overhauled and given attention in these three particulars as it was found to need it. Triska and another of these men named Frank Pitman were the regular air-brake inspectors, Pitman being the head inspector and Triska his assistant.

On the night of the accident, which occurred at 11 p. m., there not being sufficient work of inspection to keep both inspectors busy, Triska was put at the work of cleaning motors in the same gang that he was working in as car inspector and at the same place.

One Fred McCrumb was foreman of this gang.

Working with this gang also was one George Barron, whose duty it was to bring the cars to be cleaned, inspected and repaired to their proper place on this track. When occasion required it, however, the foreman, McCrumb, if not busy with his duties as foreman, would assist in bringing cars onto the track in question and placing them in position to be cleaned, inspected and repaired.

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At the time of the accident Triska was under car No. 704 cleaning the motor thereof. McCrumb at this time went further east upon the structure, got upon a car, which contained motor appliance, and brought this car west onto this same cleaning track to place it in position so that it might be cleaned, inspected and repaired, in so far as was needed. This car was No. 750. McCrumb turned the motive power or current on this car and brought it west at the rate of about six miles an hour. It had three other passenger cars attached to it, making a train of four cars, all empty. When McCrumb reached a point about a thousand or eight hundred feet away from the car under which Triska was working, he turned off the current which furnished the motor power, and let the cars travel on by their own momentum. The train of cars moved along in this way a distance of four to five hundred feet, gradually losing speed. Then McCrumb applied the air-brake to further decrease their speed, when at a point about five to five hundred and fifty feet away from the car under which Triska was working. He did this by first turning on about twenty pounds pressure on the air brake, but that not appearing to have the desired effect, he turned on about thirty pounds pressure on the air-brake; this not having the requisite effect, he turned on the full pressure, sixty to seventy pounds; and at a point about one hundred to one hundred and fifty feet from the car under which Triska was working, he reversed his lever and applied the motor current in such a way as to make the motor wheels turn backward. The train continued along up to the car under which Triska was working, bumped against it and drove that car about a car's length, crushing Triska under it, causing injuries from which Triska died the next day.

Plaintiff below filed a declaration consisting of four counts, and subsequently at the time of trial filed one additional count.

The court by instruction eliminated all counts from the consideration of the jury except the first one of the original declaration and the additional count filed during trial.

Part of the allegations of the first count of the declaration

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are as follows: "Plaintiff avers that the defendant then and there carelessly, wrongfully, recklessly and wantonly drove and propelled another car at a high and unusual and reckless rate of speed toward and against the said standing car under which the plaintiff's intestate was so working, and with great force and violence, and without any reasonable warning to the plaintiff's intestate," by reason whereof plaintiff's intestate received injuries from which he died.

Part of the allegations of the additional count, the only other count in issue, are as follows:

"While the plaintiff's intestate was working upon and cleaning and wiping the cars of the defendant, the defendant wrongfully, carelessly and recklessly drove and propelled another certain car toward and against said standing car under which plaintiff's intestate was so working with great force and violence," by reason whereof plaintiff's intestate received injuries, etc.

Upon the trial the jury found the defendant, plaintiff in error here, guilty, and assessed the damages of the plaintiff, defendant in error here, at \$2,500. From this verdict the sum of \$700 was remitted, and a judgment was entered for \$1,800. To review that judgment this writ of error is prosecuted.

JOHN A. POST and O. W. DYNES, attorneys for plaintiff in error.

Whether or not a foreman is a fellow-servant of an injured party as to the particular act which caused the injury, is entirely dependent upon the character of the act, and independent of his general character as foreman. *Fitzgerald v. Honkomp*, 44 Ill. App. 365; *I. C. Ry. Co. v. Meyer*, 65 Ill. App. 531; *Chicago & Alton Ry. Co. v. May*, 108 Ill. 288, 298; *Stockmeyer v. Reed*, 55 Fed. Rep. 259; *Crispin v. Babbitt*, 81 N. Y. 516; *Fanter v. Clark*, 15 Ill. App. 470; *Wabash, St. L. & C. Ry. Co. v. Hawk*, 121 Ill. 259; *I. C. R. R. Co. v. Swisher*, 61 Ill. App. 611; *C. & A. R. R. Co. v. McDonald*, 21 Ill. App. 409.

Where upon the conceded facts there can be no recovery,

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it is error for the trial court to refuse to give to the jury a peremptory instruction to find the issues for the defendant. Simmons v. Chicago & Tomah R. R. Co., 110 Ill. 340; Frazer v. Hough, 106 Ill. 573; Duggan v. P. D. & E. Ry. Co., 42 Ill. App. 536; Ryan v. City of Chicago, 79 Ill. App. 28; Martin v. Chambers, 84 Ill. 579; Phillips v. Dickerson, 85 Ill. 11; Pleasants v. Fant, 22 Wall. (U. S.) 120; Offut v. World's Columbian Exposition Co., 175 Ill. 472; Eastman v. Inland Steel Co., 80 Ill. App. 59.

SETH F. CREWS and RALPH CREWS, attorneys for defendant in error.

When a servant is placed in a situation of danger where engrossing duties are required of him, he has a right to assume that the master will not, without warning, subject him to other perils unknown to him. Michael v. Roanoke Machine Works, 90 Va. 492.

The servant assumes no risks except such as existed at the beginning of the employment and such as are incidental to the business, or which existed during the course of the employment of which the employe has knowledge or is bound to have knowledge. Libby v. Scherman, 146 Ill. 540; Shearman & Redfield on Negligence (5th Ed.), Par. 185a.

An employe does not assume all the risks of the service in which he may be engaged, but he assumes only ordinary, obvious or known risks. Illinois Steel Co. v. Bauman, 178 Ill. 356; B. & O. & S. W. Ry. Co. v. Alsop, 176 Ill. 473; Alton Paving, Building & Fire Brick Co. v. Hudson, 176 Ill. 270.

MR. PRESIDING JUSTICE SEARS delivered the opinion of the court.

The only questions presented are, first, as to the sufficiency of the evidence to sustain the verdict of the jury, and, secondly, as to the refusal of the court to give certain instructions tendered by counsel for plaintiff in error.

It is contended that the evidence is insufficient to sup-

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port the verdict, because, it is claimed, it appears from the evidence that McCrumb, who drove the train of cars upon the track where Triska, plaintiff's intestate, was at work under a standing car, was, in so doing, acting as a fellow-servant of Triska. Hence, it is argued, the negligence which caused the injury was the negligence of a fellow-servant, and that fact appearing from undisputed testimony, as it is claimed, the court should have directed a verdict for the defendant, plaintiff in error here.

McCrumb was foreman of the gang of men among whom Triska worked. He was Triska's foreman; and it is conceded that in setting Triska to work under the car in question, his act would be held to be that of a vice-principal of the master, viz., plaintiff in error.

But it is contended that one may occupy the position of foreman and yet perform service for the common master in the capacity of a fellow-servant of those over whom he is in some respects foreman. In other words, McCrumb, though acting as foreman and vice-principal of the master in setting Triska at work under the standing car, might have joined him in his work there, and while performing common service with him, have occupied for the time the position of a fellow-servant.

The soundness of the propositions of law which are advanced as a part of this argument of counsel, can not be questioned. It is true that the mere fact that one of a number of employes of a common master, who are in the habit of working in the same line of employment, has the direction and control of the others as a foreman in respect to such employment, will not of itself and under all circumstances make the common master liable for the acts of negligence of such governing servant by which another of such employes is injured. In order to make the master liable, his act of negligence must be an act in the line of his service as a foreman. If his act of negligence be one done in the course of service as a fellow-servant, and not in any relation to his service as a foreman and governor of the other workmen, the master will not be liable for injury

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to a fellow-laborer through such negligence, unless it be for some negligence of the master in employing or retaining him. C. & A. R. R. Co. v. May, 108 Ill. 288; Gall v. Beckstein, 173 Ill. 187, and cases therein cited.

And it is also true, as contended, that if it appear from conceded facts or undisputed evidence, that the relation of fellow-servants exists, then it may become a question of law and be the duty of the court to direct the jury as to their verdict in that behalf. Wabash Ry. Co. v. Brown, 152 Ill. 484; C. & E. I. Ry. Co. v. Driscoll, 176 Ill. 330.

But we must proceed to inquire if the facts of this case make the rules announced in these decisions applicable. Was McCrumb acting as a fellow-servant of Triska, or as vice-principal of the master, when he determined to have the train of cars run upon the track where Triska was at work, and without warning to Triska? We think it very clear that he was acting as foreman and as vice-principal of plaintiff in error when he determined that this train of cars should go upon that track, and that his omission to warn Triska was the omission of the master. And this conclusion is not altered by the fact that instead of ordering Barron to move the train, he chose to do it himself. If, instead of handling the train himself, he had ordered Barron, who usually performed that service, to move the train upon the track in question, and in so doing had failed to give any notice or warning to Triska, it could hardly be doubted that the direction to move the train upon the track without warning to Triska, was the act of a vice-principal of the master. And if, in carrying out his decision to have the train moved there, McCrumb can be said to have been acting as an ordinary workman, and hence as fellow-servant of Triska, the question would arise as to whether there was negligence only in the manner of handling the train, or as well negligence in having a train run upon that track where men were at work under standing cars, without warning to them of its approach.

We think that the jury were warranted in finding from the evidence that McCrumb was not negligent in his

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handling of the train as temporary motor man. If his testimony is to be credited, he made strenuous efforts to stop the train in time to avoid the injury. But the jury were surely warranted in finding as well that the very act of undertaking to send any train down the track without warning to the men who were working underneath the cars upon that track, was negligent and an efficient cause of the injury.

If McCrumb was also negligent in his handling of the train, and if such negligence was the negligence of a fellow-servant, yet the fact that it concurred in causing the injury would not relieve the plaintiff in error from responsibility for the act of its vice-principal in thus disregarding the safety of its employes by failing to warn them of the fact that trains were about to be moved upon the track. The question of the negligence of McCrumb and the responsibility of the master therefor, was, upon the facts in this case, a question for the jury. C. & A. R. R. Co. v. Swan, 176 Ill. 424.

We think that the verdict is sustained by the evidence.

The remaining question is as to the ruling of the trial court upon instructions.

The first of the refused instructions told the jury in effect that if McCrumb could not, in the exercise of ordinary care, stop the motor car in time to avoid the injury, then the plaintiff could not recover. It was properly refused, for it ignored the question of whether, in the exercise of ordinary care, the train should have been sent upon the track at all without warning to Triska.

The refusal to give the second was not error, for it was sufficiently covered by the nineteenth instruction given.

The third refused instruction was substantially included in the twenty-second instruction given.

The seventh was covered by two instructions given, viz., the fourteenth and the eighteenth.

Each of the sixth and eighth refused instructions presents correct propositions and such as should, at the request of either party, be given to the jury. We are of opinion

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that the trial court should in this case have given them as requested. In substance, they inform the jury that they should not arrive at their verdict through considerations other than of the evidence and the law; that they should not allow prejudice or sympathy to influence their action in this behalf, and that they should not reach a verdict by chance. But while the court should, we think, have given these instructions, yet it does not follow that the refusal should work a reversal. For two reasons we are disposed to disregard the error in refusing to give those instructions: first, because we are of opinion that the evidence clearly warrants the verdict which was returned; and secondly, because of the number of other instructions submitted to the court and given. Fifty-four instructions were tendered to the court, of which forty-five were instructions offered by the defendant, plaintiff in error here. The court gave twenty-six of these instructions to the jury, seventeen of those given being instructions which were tendered by the plaintiff in error. In the course of these twenty-six instructions, the jury were very thoroughly informed as to just what should guide them in arriving at their verdict. In the nineteenth instruction given, they were directed to disregard any theory or argument as to anything not covered by the specific charges of the declaration, and that they should not consider any ground of recovery other than the specific charges of the declaration. We are of opinion that in view of all these instructions which were given, it may be safely concluded that no prejudice to plaintiff in error resulted from the refusal to give the two instructions indicated.

No question is raised as to other instructions than those noted or as to other rulings of the trial court. The judgment is affirmed.

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**Singer & Talcott Stone Co. v. Dillon B. Hutchinson
and William W. Post, for the use of, etc.**

1. **REAL ESTATE BROKER—When Entitled to Commissions.**—A real estate broker who is the efficient and procuring cause of a sale of real property is entitled to his commissions.

Assumpsit, for commissions. Trial in the Superior Court of Cook County; the Hon. ARTHUR H. CHETLAIN, Judge, presiding. Finding and judgment for plaintiffs; error by defendant. Heard in this court at the March term, 1899. Affirmed. Opinion filed July 20, 1899.

IRA W. & C. C. BUELL and A. B. JENKS, attorneys for plaintiff in error.

BARNUM, MOTT & BARNUM, attorneys for defendants in error; THOMAS A. MORAN, of counsel.

MR. JUSTICE WINDES delivered the opinion of the court.

Defendants in error, in a trial before the court and a jury, recovered a judgment of \$15,496.33 against plaintiff in error for commissions on a sale of some valuable real estate in Chicago, owned by plaintiff in error. A previous trial before the court without a jury resulted in a judgment in favor of defendants in error, which was reversed by this court (61 Ill. App. 308), it being held that, under the evidence then appearing in the record, the conduct of Post, one of the defendants in error, through whose efforts it was claimed the real estate was sold, warranted the belief by plaintiff in error that he had abandoned all efforts to sell long before the sale was effected, as it was claimed, through the efforts of another broker named Davis. This court there said: "It is not a case of conflicting evidence, but of the proper inference from undisputed facts."

We think that the evidence in this record presents a conflict on material points, and where the facts are undisputed it presents a question as to what inference should be

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drawn therefrom, and on this question reasonable and fair-minded persons might well differ in their conclusions. At least such is the opinion we have reached after a careful and deliberate consideration of the evidence under the guidance of the able and persuasive arguments of the learned counsel.

Defendants in error were partners as real estate brokers, doing business in Chicago, and were employed in January, 1892, by plaintiff in error through its president, E. T. Singer, to find a purchaser for certain valuable real estate in Chicago owned by plaintiff in error. The agreement was made and business done by William W. Post on behalf of defendants in error. The consideration to be paid was two and one-half per cent of the selling price. There is a conflict in the evidence as to whether the contract of defendants in error was that they should make a sale before they would be entitled to their commission, but we are of opinion the preponderance of the evidence is that they were only to find a purchaser who should make the purchase at a price satisfactory to plaintiff in error. The selling price given by E. T. Singer to Post was \$10 per square foot, but that price was then conceded by Singer to be rather high, and he instructed Post, in substance, that if any proposed purchaser did not want to pay that price, he, Singer, would probably make a concession and he would not let the price stand in the way of a sale. In effect the agreement was that if a sale should be made to any one produced by Post at a price which would be satisfactory to plaintiff in error, then defendants in error would be entitled to their commission.

During the months of March and April, 1892, Post had various negotiations with different persons with regard to a sale of the property, and among others who became interested in the property was a gentleman named Chapin, who resided at Niles, Michigan, and who had an agent in Chicago named Ulm.

The attention of Chapin and Ulm had been directed to this same property by another broker some time in the year 1891, but they did not then become interested in it.

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At the time Singer employed defendants in error, he informed Post that a number of other persons had been authorized to sell the property, but that an exclusive agency was not given to any of them, nor were defendants in error to be exclusive agents for its sale.

Post placed in the hands of Ulm and Chapin plats of the property furnished to him by plaintiff in error, and gave them the price of \$10 per square foot in the latter part of March or early in April, 1892, and talked with them in regard to the sale of the property. He talked with Ulm about a sale of the property to Chapin as early as February or March, 1892, and before he saw Chapin. There was some discussion between them as to the number of square feet in the property, and Post testifies that Ulm told him, in the presence of Chapin, that they (meaning Chapin and Ulm) had looked at the property and thought favorably of it, but that the price was too high. Also that before the final interview in April, 1892, ended, they (Chapin and Ulm) stated to him that they would consider the matter further, and would communicate with him further about it. They did not make Post an offer for the property at any time and did not communicate further with him about it nor he with them. Chapin looked at the property very soon after that time.

There is a conflict in the evidence as to whether Post gave the name of Chapin to E. T. Singer and Walter Singer, who was the treasurer of plaintiff in error, during the month of April, 1892, but we are of the opinion that a preponderance of the evidence shows that Post did communicate with both the Singers (Walter and E. T.) in April, 1892; that Chapin was a proposed purchaser of the property and that he was represented by his agent, Ulm, in Chicago. Defendant in error Hutchinson, as well as Post, testified that he talked in the spring of 1892 with both the Singers, at different times, about Chapin being a proposed purchaser, and that Ulm was his agent in Chicago. Walter Singer denied these conversations, as did E. T. Singer also at first, but finally admitted that Chapin's name

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was mentioned to him by Post as a proposed purchaser in the spring of 1892. Post did not at any time bring Chapin personally in contact with the Singers or with any one representing plaintiff in error.

Early in April, 1892, but after E. T. Singer knew that Chapin was a proposed purchaser, Singer left the city of Chicago, and during the remainder of that month and up to September following, with the exception of a few days at a time, he was absent from Chicago, and during that absence he did not see Post or have any communication from him regarding the property. Also during most of this same time both Chapin and Ulm were also away from Chicago, and so far as appears from the evidence, took no interest in the property.

Some time during the month of September, 1892, a man by the name of Davis, who testified that his business was that of a real estate broker, also testified that he presented the property in question to Chapin for sale; that negotiations were carried on from that time between him and Chapin, and Ulm, acting in behalf of Chapin, which resulted in a contract of sale of the property on December 15, 1892, by plaintiff in error to said Chapin for the sum of \$509,178, being at the price of about \$8.50 per square foot for the property. This contract was consummated and the property conveyed by plaintiff in error by deed dated January 3, 1893, to Chapin, and Davis says that he received one-half the commission on the sale, of \$12,179.45, through a credit given him by Ulm, the other half of the commission going to Ulm. When the deal was closed the whole of the commission was deducted from the purchase price, and Davis executed and gave his receipt to plaintiff in error therefor.

We are satisfied, from a careful consideration of the evidence, that Davis, in the negotiations which he says he carried on for the sale of this property, acted as the agent of Chapin and not of plaintiff in error; that he was furnished with a plat of the property by either Chapin or Ulm, and was used by them as an intermediary to continue the

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negotiations which Post had begun between Chapin and Ulm and plaintiff in error, and that these negotiations resulted in the sale of the property.

Davis was not a licensed real estate broker at the time, and we think it apparent from the evidence, though he testifies that he learned of the property first from Charles G. Singer, that his attention was first called to the property by either Chapin or Ulm, and either that they used Davis merely as a means of purchasing the property at a lower price, or that Davis was made use of by Ulm to secure to himself one-half of the commissions for the sale. Davis contradicts himself in his evidence, and we think the jury were justified from it and the other evidence in the case, in concluding that he did not testify truthfully in saying that he first heard of the property from Charles G. Singer, and that in the negotiations leading up to the sale he acted as the agent of plaintiff in error.

Post knew the residence of Chapin was at Niles, Michigan, but did not try to communicate with him after April, 1892. He also knew that Ulm had an office in Chicago, but it does not appear that he made any effort to see Ulm after the month of May, 1892, nor to communicate with him. He says he went several times in April and May, 1892, to Ulm's office to see him, but was told that Ulm was at his summer resort. He says that he didn't know that Ulm had returned to Chicago before September 20, 1892, and didn't go to Ulm's office in September, October, November or December, 1892. He says he didn't know where Ulm or Chapin were during those months. The Singers had an office during the year 1892, at 175 Dearborn street, Chicago, very near to Post's office, which was on Washington street, and they also had another office at 334 Franklin street, Chicago. From the latter part of September, 1892, until the property was sold, E. T. Singer was in Chicago, but Walter Singer's residence was at Duluth, Minnesota, during the whole of 1892, and he says that during the summer and fall of 1892, he was in Chicago from one-quarter to one-half his time. Post was instructed by E. T. Singer to go to

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Walter Singer if anything came up in the absence of E. T. Singer during the summer.

After E. T. Singer's return to Chicago in September, 1892, Post made no effort to see either of the Singers with regard to the property until after the sale, which came to Post's knowledge about the time the deed was recorded.

Post says that he relied on Chapin and Ulm's agreement with him, at his last interview with them in April, 1892, to communicate with him and take up the question later, as soon as they had settled definitely regarding the building of some apartment buildings or other buildings that they had planned for, that they were considering at the time of that interview, and that for this reason he did not make any effort to see them during the fall of 1892, and before the sale was effected, and also because he supposed that Singer knew absolutely that he, Post, was dealing with Chapin and Ulm, and that he did not believe Singer would enter into a contract on the property and turn his back on him, Post.

E. T. Singer knew, if not before, as early as December 10, 1892, five days before the contract of sale and twenty-five days before the deal was consummated and the commission to Davis and Ulm was deducted from the purchase price paid by Chapin, that Chapin was the purchaser and that Ulm was negotiating the purchase on behalf of Chapin. He does not say that he ever employed Davis as a broker to make a sale of the property. Walter Singer was not asked anything with regard to Davis' connection with the sale, and Charles G. Singer, who signed the contract of sale and deed to Chapin as secretary of plaintiff in error, was not called as a witness in the case.

E. T. Singer's testimony as to his knowledge of Chapin being a proposed purchaser through Post as early as April, 1892, is contradictory, he insisting at first that he learned of Chapin through Davis in December, 1892; he finally admitted that Post told him of Chapin before he, Singer, left Chicago in April, 1892, but says that when he returned, in September following, and at the time the contract of

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sale was made and the deed passed, he had forgotten that Post had ever mentioned Chapin to him.

Post testifies that when he talked with E. T. Singer about the transaction after the deal was closed, Singer said to him that he was peculiarly impressed by the closing of the deal, referring to the matter of Davis' commission being deducted from the purchase price, but it made no difference to him, Singer, and so he allowed it to be done. This is not contradicted by Singer.

While it is true that Post was not very diligent in following up Chapin and his agent, Ulm, so as to effect a sale of the property, we think, from a careful consideration of all the evidence, the jury were justified in concluding from it that Post was really the cause of Chapin becoming interested in the property; that this interest did not die out; that when Ulm and Chapin returned to Chicago in the fall of 1892, they renewed their negotiations with plaintiff in error through Davis, who acted for them and not for plaintiff in error, and that Post was really the efficient and procuring cause of the sale. The fact that plaintiff in error paid a commission to Davis which was divided with Ulm, is not of controlling importance in determining the rights of defendants in error, and E. T. Singer's testimony that when he made and consummated the contract with Chapin he had forgotten that Post had ever mentioned Chapin to him as a prospective purchaser, is not controlling. Singer should not have forgotten so important a matter, and we are of opinion, from a full consideration of his evidence, that the jury was justified in believing that he had not in fact forgotten it.

The evidence tending to show that Post had abandoned the idea of a sale of the property to Chapin, loses much of its importance in view of the fact, which we think the jury was justified in finding from the evidence, that Ulm and Chapin in September, 1892, renewed their negotiations, through Davis as their agent, with plaintiff in error.

Post being the efficient and procuring cause of the sale, he was entitled to his commissions. *Short v. Millard*, 68

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Ill. 292; Carter v. Webster, 79 Ill. 435; Wilson v. Mason, 158 Ill. 304; Day v. Porter, 161 Ill. 235; Hafner v. Herron, 165 Ill. 242; Swigart v. Hawley, 40 Ill. App. 610; Jenks v. Nobles, 42 Ill. App. 33, and Sussdorff v. Schmidt, 55 N. Y. 319.

From a careful consideration of the instructions given, those modified and given, and those refused, we are of opinion there is no reversible error in any of the court's rulings on any of the instructions.

Objections are also made to rulings of the court in the admission and exclusion of certain items of evidence. We think the matters presented are not of sufficient importance to justify special mention in this opinion. We think there was no reversible error in any of the court's rulings on the evidence. Other errors assigned are either expressly waived by the briefs, or are waived by a failure to argue them.

The judgment is affirmed.

SEARS, J., took no part in the decision of this case.

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**Edward T. Singer and Charles G. Singer v. Dillon B.
Hutchinson and William W. Post, for
the use of, etc.**

1. **JUDGMENTS—*Against Corporations, upon Whom Conclusive.***—A judgment against a corporation is conclusive as against its stockholders until reversed or impeached for fraud.

2. **SAME—*Conclusive as to All Defenses Provable.***—A judgment is conclusive upon all questions which were or might have been proved under the issues.

3. **CORPORATIONS—*Construction of the Statute Extending the Existence of.***—Section 1 of the act to amend an act entitled "Abatements" approved March, 1845, and to extend the time for closing up the affairs of corporations, in force March 24, 1869 (Laws, 1869, 1), providing that all corporations created by special acts or under general laws, and whose charters have expired, shall continue their corporate capacity during the term of two years for the purpose of collecting its debts, etc., is a general

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law, and so far as practical should be applied to foreign corporations having property here and located in this State for business purposes.

4. *SAME—Capital Stock, When a Trust Fund.*—In equity, the capital stock and property of a corporation is a trust fund for the payment of its debts.

5. *SAME—Assets—How Regarded in Equity.*—Equity regards the assets of a corporation in the hands of stockholders as the property of the corporation and subject to the claims of its creditors.

6. *PRACTICE—Creditors' Bills Against Corporations.*—A judgment creditor, as complainant in a creditor's bill against a corporation, has nothing to do with the equities existing between the stockholders, and when a part only of the stockholders is made parties defendant, their remedy, if they desire an equitable distribution of the burdens, is to file a cross-bill.

7. *SAME—Parties to Creditors' Bills.*—In a creditor's bill against a corporation, it is not necessary to make all of the stockholders parties defendant as it is in a bill under section 25 of chapter 82, R. S., entitled "Corporations," to dissolve and close up its business.

Creditor's Bill.—Appeal from the Circuit Court of Cook County; the Hon. JOHN GIBBONS, Judge, presiding. Heard in this court at the March term, 1899. Affirmed. Opinion filed July 20, 1899.

Statement by the Court.—This is an appeal from a decree rendered on a creditor's bill filed by appellees, as complainants, January 7, 1898, against appellants and others as defendants, to reach the assets of the Singer & Talcott Stone Company, in the possession of the defendants as stockholders.

Edward T. Singer, Charles G. Singer, Walter Singer, Harriet A. Singer, Charles B. Kimball, Spencer Kimball and the Singer & Talcott Stone Company were made defendants to the bill. All defendants were served with process, except Walter Singer and Charles B. Kimball, in respect to whom process was returned "not found." On the hearing the bill was dismissed as to Walter H. Singer, Harriet A. Singer, Charles B. Kimball and Spencer Kimball. Answers were filed by Edward T. Singer, Charles G. Singer, Harriet A. Singer and Spencer Kimball, Harriet A. denying that she ever was a stockholder in the Singer & Talcott Stone Company, or ever had anything to do with its management, and Spencer Kimball averring that in the year

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1875, he sold all his stock in the corporation, and that since said time he has had no interest in the corporation or any knowledge of its affairs.

The evidence shows that June 12, 1897, a judgment was rendered in the Superior Court of Cook County in a suit in which appellees were plaintiffs and the Singer & Talcott Stone Company was defendant, in favor of appellees, for the sum of \$15,496.33 and costs; that August 10, 1897, an execution was issued on said judgment, which execution was returned by the sheriff November 8, 1897, "no property found."

The complainants read in evidence the following from the joint and several answer of Edward T. Singer and Charles G. Singer, which answer was verified by the joint and several affidavit of the said defendants:

"These defendants allege the facts to be that from the time of the expiration of the charter of said company and for several years before, it, the said corporation, had no property whatever except the piece of real estate in said bill mentioned and admitted to have been sold, all of the other property that had ever belonged to said corporation having before that time been disposed of, and the proceeds thereof having been distributed among its stockholders in accordance with their respective rights. The defendants further allege the facts to be that on January 3, 1893, for the purpose of disposing of all the property of said corporation and absolutely winding up the affairs of said corporation and distributing among its stockholders, according to their respective rights, all of the assets of said corporation, the said real estate was sold and disposed of, and defendants admit that on or about the 3d of January, 1893, the Singer & Talcott Stone Company conveyed to one Charles A. Chapin the property in said bill described, for the consideration of \$509,178, which consideration was received, partly in money and partly in promissory notes secured by mortgages on divers pieces of real estate, and that said deed of conveyance was executed on behalf of said company by Edward T. Singer as president and Charles G. Singer as secretary of said company.

"And these defendants further answering, aver that said consideration for said conveyance was received by these defendants for the Singer & Talcott Stone Company, and

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the entire net proceeds thereof were immediately thereafter, and on or about the 6th day of January, 1893, distributed to and among the several stockholders of said company in proportion to the amount of stock in said company held by said stockholders respectively; to this defendant, Edward T. Singer, \$130,500; to this defendant, Charles G. Singer, \$55,000; to Walter H. Singer, \$88,500; to Horace H. Singer, now deceased, \$17,000, and to these defendants, Edward T. Singer, Charles G. Singer and Walter H. Singer, jointly as trustees and in trust, to pay the income thereof to Harriet Singer so long as she shall live, \$203,637. The capital stock of said company consisted of 300 shares of \$100 each. Before having been divided the same was held as follows: Said Edward T. Singer, eighty shares; said Walter H. Singer held fifty-five shares; the said Charles G. Singer held thirty-five shares; Horace M. Singer, now deceased, held ten shares; the said Edward T. Singer, Charles G. Singer and Walter H. Singer held as trustees jointly 120 shares; that the persons so named as receiving said proceeds of said sale constituted the sole and only stockholders of said corporation at the time of said distribution, and at the time of the expiration of its charter as aforesaid, and for several years prior to that time.

"These defendants further answering admit that they claim, and they aver that it was true in fact, that the Singer & Talcott Stone Company is and was a dissolved corporation, and that such dissolution occurred before and without the payment of any such sum of money whatever to said complainants; that said defendants took no notice and were not bound to take any notice of said supposed judgment, and they allege that such supposed judgment did not exist at the time of the dissolution of said corporation, or for many years thereafter; and that also at the time of said distribution of the proceeds of the consideration of said conveyance above set forth, no claim had been made by said complainants or either of them upon said corporation, its officers or agents, and they deny that there was any sum of money due or to become due from said corporation to said complainants, or either of them, on account of services in making such sale, or upon any other account whatever; and they deny that during the life of said corporation, or prior to its dissolution, as aforesaid, said complainants, or either of them, had or pretended to have any claim or demand against said corporation. And on information and belief they deny that the Singer & Talcott Stone Company, at any

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time since the expiration of its charter as aforesaid, had any corporate existence or capacity, by statute or otherwise, to be sued by said complainants, and they allege the fact to be, that if there is or was any statute whatever, which continued the capacity of said corporation after the 20th of April, 1892, for the purpose of being sued, such suit could be maintained under such statute only upon a claim that existed against said corporation at the date last aforesaid, and that such complainants had not, at that date, or any time prior thereto, any claim whatever against said corporation, or its corporate assets, or trust funds, still liable to be sued, prosecuted or followed in this proceeding by said complainants for the payment of said proposed judgment, and they deny that the other defendants herein, or either of them, are liable to be sued or prosecuted, as aforesaid, and they deny that good or proper service upon said corporation was made in this cause, and allege that owing to its dissolution as above set forth, no proper service could be made upon said corporation at or since the time of the commencement of this suit."

Complainants called as a witness appellee William W. Post, who testified in substance that he and Hutchinson, the complainants in the present bill, were the plaintiffs in the suit in which the judgment above mentioned was recovered, and that no part of the judgment had been paid. The witness was also examined and testified at considerable length as to the facts on which the judgment was recovered. Subsequently, and before complainants closed their evidence, the court excluded all of Post's evidence which did "not go simply to identify the cause and the parties," meaning presumably, to let stand only that part of the testimony showing that the complainants in the bill were the plaintiffs in the judgment.

Appellees also put in evidence the articles of incorporation of the Singer & Talcott Stone Company, and a warranty deed from that company to Charles A. Chapin of Niles, Michigan, of date January 3, 1893, for the consideration of \$509,178, of lots 29 to 33, both inclusive, except the north ten feet of lot 33 lying west of the east 35 feet thereof, in block 89, School Section addition to Chicago, county of Cook and State of Illinois, signed Edward T. Singer,

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president, Charles G. Singer, secretary, and impressed with the corporate seal of the Singer & Talcott Stone Company.

The defendants (appellants here) offered evidence tending to show that appellees were not entitled to recover in the action at law, in other words, such evidence as might have been admissible in that suit, which evidence the court excluded. The ordering part of the decree is as follows:

"It is therefore ordered and decreed by the court, that the bill of complaint herein be, and the same is hereby dismissed without prejudice as to the defendant, Harriet A. Singer, and it is further ordered, adjudged and decreed by the court, that the defendants, Edward T. Singer and Charles G. Singer and the Singer & Talcott Stone Company, pay to the complainants, Dillon B. Hutchinson and William W. Post, for the use of said Post, within ten days from this date, \$16,639.66, with lawful interest thereon, from date until paid, and the costs of this suit to be taxed by the clerk of this court, and that this decree for the payment to be made as aforesaid, shall be and is hereby made joint and several as to each of the three defendants, Edward T. Singer, Charles G. Singer and the Singer & Talcott Stone Company, until the whole of said amounts so decreed to be paid shall be collected or paid under this decree, and that the complainants, for the use of the complainant William W. Post, may have execution accordingly for the collection of said amount."

IRA W. & C. C. BUELL, attorneys for appellants; A. B. JENKS, of counsel.

A judgment against a corporation fixing its liability and the amount of its indebtedness is not admissible in a proceeding against a stockholder as evidence of the validity and amount of the claim on which the judgment was recovered. Chesnut v. Pennell, 92 Ill. 55.

BARNUM, MOTT & BARNUM, attorneys for appellees; T. A. MORAN, of counsel.

Parties may proceed by bill against a part of the stockholders without joining all, subject to the right of those brought in by a bill to bring in the others by cross-bill. Clapp v. Peterson, 104 Ill. 26; Hickling v. Wilson, 104 Ill.

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54; Peterson v. Lynde, 112 Ill. 196; Young v. Farwell, 139 Ill. 326; see also Hatch v. Dana, 101 U. S. 205; Coleman v. Howe, 53 Ill. App. 82.

A stockholder who is made a defendant to a creditor's bill may file a cross-bill and bring in the stockholders who are not parties, and enforce contribution from them. Young v. Farwell, 139 Ill. 332. But if he neglects to do so, the remedy against himself does not fail. Coleman v. Howe, 154 Ill. 458.

The stockholders of a corporation are bound by a judgment against the corporation in the absence of fraud. Clapp v. Peterson, 104 Ill. 26; Gt. Western Tel. Co. v. Barker, 56 Ill. App. 402, 421; Hendrickson v. Bradley, 29 C. C. A. 303, 311; Stephens v. Fox, 83 N. Y. 313.

A stockholder of the company is equally bound and concluded for the reason that he is an integral part of the corporation, and in contemplation of law "he was before the court in all the proceedings touching the company of which he was a member." Sanger v. Upton, 91 U. S. 56; Wilson v. Seymour, 40 U. S. App. 567. It can not be relitigated in this case for the reason that the defendants, as shareholders, being represented by the corporation in that suit, have already had their day in court on this question. Hendrickson v. Bradly, 29 C. C. A. 303, at page 311; Stutz v. Handley, 41 Fed. 537.

MR. JUSTICE ADAMS delivered the opinion of the court.

Appellants' counsel, in their argument, make the following objections:

1. "The judgment obtained at law against the Stone Company is not binding on appellants."

2. "The finding of the court in this decree that the Stone Company employed appellees before the expiration of its charter, and while it had power so to do, is not supported by any evidence in the case."

3. "The company had no power during the two years subsequent to the expiration of its charter to make any new contract."

4. "No living solvent stockholder should have been dismissed out of court, but the decree, if appellees were entitled

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to a decree, should have been that the stockholders should pay ratably."

These objections will be considered in the order stated.

A judgment against a corporation is conclusive as against its stockholders until reversed or impeached for fraud. 2 Morawitz on Corp., Sec. 886; 1 Cook on Corp., Sec. 209; Bennett v. Great West. Tel. Co., 53 Ill. App. 276; Great West. Tel. Co. v. Gray, 122 Ill. 630; Bates v. Great West. Tel. Co., 134 Ib. 536; Hawkins v. Glenn, 131 U. S. 319; Hendrickson v. Bradley, 29 Ct. Ct. App. (U. S.), 303, 311; Thayer v. New Eng. L. Co., 108 Mass. 523, 528.

In a note to Bissit v. Ky. River Navigation Co., 15 Fed. Rep. 353, at page 360, a great many cases are collated on "the effect as to stockholders and officers of a judgment against the corporation," showing that the authorities are almost unanimous in holding that such a judgment is conclusive against the stockholders until reversed or impeached for fraud. The judgment has not been reversed, nor have appellants attempted to impeach it for fraud. On the contrary, appellants' counsel, in their argument, say:

"We do not maintain that the judgment against the Stone Company is void, nor do we seek to impeach the record of the same."

The court in its decree found as follows, in respect to the claim of appellees, which was the foundation of their judgment against the Singer & Talcott Stone Company:

"Said claim so reduced to judgment, and the liability of said company, were legitimately incurred by said company in the exercise of said company's corporate capacity and power, in and about the selling and disposing of its corporate property, and was so incurred by the employment of the Singer & Talcott Stone Company of the complainants herein, on or about January 10, 1892, as real estate brokers, to procure for said company a purchaser for its said above described real estate," etc.

The Singer & Talcott Stone Company was organized under "An act to authorize the formation of corporations for manufacturing, mining, mechanical or chemical purposes," approved and in force February 18, 1857. The com-

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pany was organized April 20, 1872, and the term of its corporate existence was fixed by its articles of association and the license issued in pursuance thereof, at twenty years, viz., until April 20, 1892. The specific objection to the above finding of the court is that, excluding the evidence of Post, there is no evidence to justify the finding that appellees were employed by the Singer & Talcott Stone Company prior to April 20, 1892. The pleadings in the lawsuit in which the judgment against the Singer & Talcott Stone Company was recovered by appellees, consisting of a declaration and plea of the general issue, were put in evidence by appellees. The declaration contains a special count, in which is averred the employment of appellees by the company to procure for the company a purchaser of certain described real estate owned by it, at ten dollars per square foot, or at such price as would be satisfactory to the company, appellees, for procuring such purchaser, to receive two and one-half per cent of the price paid, and that appellees did procure such purchaser at a price satisfactory to the company, etc.

The company was sued and declared against by the name "Singer & Talcott Stone Co., a corporation," and filed a plea of the general issue in that name, supported by an affidavit of merits by Edward T. Singer, in which affidavit the affiant states that he is the president of the Singer & Talcott Stone Company. The record of the judgment shows that the company, by its attorney, moved for a new trial and in arrest of judgment, and argued those motions, from all of which it appears that the cause was tried and judgment rendered on the merits. The judgment so rendered is conclusive that all matters essential to a recovery were proved. The action was assumpsit, and it was necessary to appear that the defendant, the Singer & Talcott Stone Company, had made a contract with the plaintiffs, which it had the corporate capacity to make. It was under the pleadings clearly competent for the Stone Company to show, if such was the case, that the contract under which the plaintiffs claimed was not within the corporate power of the company; that it was *ultra vires*, and, therefore, that in legal

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contemplation there was no contract. A judgment is conclusive as to all defenses provable under the issues. 2 Black on Judgments, Sec. 609.

The judgment being conclusive as against the company, and therefore against appellants, that the company had the corporate capacity to make the contract on which the judgment was taxed, then if the company had not such corporate capacity after April 20, 1892, as assumed by appellants' counsel, the court was fully warranted by the record of the lawsuit in finding that the liability of the company was incurred prior to April 20, 1892.

In support of the contention that the liability occurred prior to April 20, 1892, counsel for appellant rely on the averment in the declaration, "That on the 1st day of June, 1892, in consideration that said plaintiffs, at the request of said defendant, would procure a purchaser," etc. But it is elementary that a statement of the precise time is not necessary, and that a plaintiff is not bound to prove the precise time stated.

"Thus, in assumpsit upon a contract, the day upon which it is made being alleged only for form, the plaintiff is at liberty to prove that the contract, whether it be express or implied, was made at any other time." 1 Chitty on Pl., 9th Am. Ed., 257; see, also, Kipp v. Bell, 86 Ill. 577.

Such being the law, it can not be assumed that the precise time laid in the declaration was the time proved on the trial.

Section 1 of "An act to amend an act entitled 'Abatements,' approved March, 1845, and to extend the time for closing up the affairs of corporations," in force March 24, 1869, (Sess. Laws 1869, p. 1,) is as follows:

"Be it enacted by the People of the State of Illinois, represented in the General Assembly: That all corporations created by special acts or under general laws, and whose charter or acts of incorporation may have expired for any reason whatever, shall continue their corporate capacity during the term of two years for the sole purpose of collecting the debts due to said corporation, selling and conveying the property and estate thereof."

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If this act applies to the Singer & Talcott Stone Company, then that company had power for at least two years after April 20, 1892, to sell and convey its property; but appellants' counsel, basing their argument on the words "may have expired," contend that it does not apply to that company, but only to corporations created prior to its passage, and that the Singer & Talcott Stone Company was organized April 20, 1872, subsequently to the passage of the act. We can not accede to this view. The act is general, applies in terms to all corporations, and is in part amendatory of chapter 1 of the Revised Statutes of 1841, entitled "Abatements," which is a general law; and section 1, quoted *supra*, confers a special privilege, namely, an extension of corporate life for two years beyond the time fixed by the charter. No reason is perceived why the legislature should discriminate in favor of corporations organized prior to the passage of the act and against those thereafter organized. In *Ramsey v. P. M. & F. Ins. Co.*, 55 Ill. 311, the court, commenting on the act in question, say: "It was evidently the intention of the legislature to preserve to corporations whose charters might be forfeited or their organization dissolved, the right to collect their debts and sell their property," etc. Ib. p. 316.

In *Life Ass'n of America v. Fassett*, 102 Ill. 315, one of the questions presented was whether the corporate life of the association, which was a Missouri corporation, had become extinct by reason of a decree of the Circuit Court of St. Louis, entered October 16, 1879, declaring it insolvent and dissolving it. October 15, 1879, prior to the entry of the decree, an attachment had been levied on the land of the association in this State. The court, after referring to sections 10 and 25 of chapter 32 of the statutes, by the former of which sections the corporate capacity of corporations is extended as by section 1 of the act of 1869, say:

"From these and other provisions of the statute, it clearly appears that it is a part of the settled policy of the State, at least so far as domestic corporations are concerned, that upon their dissolution, however that may be effected, they shall nevertheless be regarded as still existing for the pur-

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pose of settling up their affairs and having their property applied for the payment of their just debts, and we see no sufficient reasons why the same policy should not, so far as practicable, be extended to foreign corporations that have property here, and are located among us for business purposes."

We have no doubt that section 1 of the act of 1869 applies equally to corporations organized before and after its passage, which being true, the Singer & Talcott Stone Company had ample power to sell and convey its property at any time between April 20, 1892, and April 20, 1894, and it evidently acted with this understanding, the deed of the land from the company to Chapin being dated January 3, 1893, and sealed with the corporate seal of the company. And if it had power to sell, it had power to employ an agent for that purpose. Indeed, being a corporation, it could act only by an agent.

The special count of the declaration in the lawsuit is for commissions earned by appellees in the procuring the purchaser of the company's property, and the copy of the account sued on, which is, in substance, a bill of particulars, is for commissions earned in procuring the purchaser for the property, describing it, and limited appellees to proof of that claim. What has been said disposes of appellants' second and third objections.

The objection that it was error to dismiss the bill against some of the defendant stockholders, and that the decree should have been that the claim of appellees should be paid by all the stockholders, they contributing ratably, is untenable. This is a creditor's bill and not a bill under section 25 of the incorporation act to dissolve and close up the business of the corporation, and it is not necessary to make all stockholders defendants. *Young v. Farwell*, 139 Ill. 332; *Palmer v. Woods*, 149 Ib. 146, 155; *Bartlett v. Drew*, 57 N. Y. 587; *Hatch v. Dana*, 101 U. S. 205.

The case of *Bartlett v. Drew*, *supra*, approved in 104 Ill. 35, was in its facts similar to the case at bar. In that case the plaintiffs had recovered judgment against the New Jersey Steam Navigation Company and an execution had been

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issued on the judgment and returned unsatisfied. Prior to the commencement of the suit in which the judgment was recovered, the Navigation Company had sold three of its steamboats and distributed the proceeds of the sale, \$750,000, among its stockholders; the action was brought against the corporation and Daniel Drew, a stockholder, who had received as his share in the proceeds of the sale a much larger amount than the plaintiff's judgment. Drew objected, as do appellants here, that the suit should be against all the stockholders, to the end that each might contribute his proportion of the plaintiff's judgment. The court overruled the objection, saying, among other things:

"We are of opinion that the plaintiff's right of action rests upon a very plain principle of equity. This is not a proceeding to dissolve and wind up the affairs of a corporation, or to marshal its assets, but the ordinary proceeding to collect a debt from a debtor unwilling to pay." * * * "It is a very plain proposition that the stock and property of every corporation is to be regarded as a trust fund for the payment of its debts, and its creditors have a lien and the right to priority of payment over any stockholder. When stock and property have been divided between stockholders before all the debts of the corporation have been discharged, if any one stockholder is compelled to pay more than his fair share of any unpaid debt, he may resort to his associates for equitable contribution; but with that proceeding the creditor has nothing to do, unless he chooses to intervene to settle equities that may exist between his debtors."

That the capital stock and property of a corporation is a trust fund for the payment of its debts, is fundamental in equity, and has been expressly recognized by the Supreme Court. *Clapp v. Peterson*, 104 Ill. 26; *Coleman v. Howe*, 154 Ib. 458.

Equity regards the assets of a corporation in the hands of stockholders as the property of the corporation and subject to the claims of creditors of the corporation. In *Bartlett v. Drew*, *supra*, the court say:

"Drew had a large amount of the assets in his possession which belonged to the corporation when the plaintiff's demand accrued, and some portion of which should have been applied in discharge of its obligation to the plaintiff."

The Supreme Court of this State has also decided that a judgment creditor, complainant in a creditor's bill, has nothing to do with the equities as between the stockholders, and that when part only of the stockholders are made defendants, their remedy, if they desire equitable distribution of burden, is to file a cross-bill. *Clapp v. Peterson*, 104 Ill. 26, 35; *Coleman v. Howe*, 154 Ib. 474.

In the present case no cross-bill was filed, nor was leave asked to file one. If it be suggested that this was unnecessary because all stockholders were originally parties to the bill, the obvious answer is, that appellees having the right to proceed against part of the stockholders, clearly had the right to dismiss as to any of them, and the appellants were not warranted in presuming that they would not so do, and in omitting, on such presumption, to file a cross-bill. However, the remedy of appellants for equitable distribution of the burden of payment is not lost by this omission; they may file an original bill for that purpose if they see fit so to do.

Appellants further object to the refusal of the court to permit cross-examination of the witness, Post, and to the exclusion of evidence offered by them on the merits of the claim of appellees which was reduced to judgment. All of Post's evidence having been excluded except that part of his testimony that the complainants in the present suit were the plaintiffs in the lawsuit, which evidence was unnecessary, the names being the same, the case stood as if Post had not been examined, and there was no ground for cross-examination. The evidence offered by appellants was properly excluded, because, the judgment being conclusive against them, they had no right to a re-trial of the suit at law. The evidence showed that each of the appellants has in his possession money of the Singer & Talcott Stone Company in amount largely in excess of the judgment against the company.

The decree will be affirmed.

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